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No. 97-209 JUL 31 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

Petitioner,

—v.—

THE SUPREME COURT OF THE STATE OF NEW JERSEY, ROBERT WILENTZ (intended to be the Chief Judge of the Supreme Court of New Jersey) STEPHEN W. TOWNSEND (intended to be the Clerk of the Supreme Court of New Jersey), THE NEW JERSEY STATE BOARD OF BAR EXAMINERS, SAMUEL J. UBERMAN (intended to be the Assistant Secretary of the New Jersey Supreme Court who plaintiff believes to direct the State Board of Bar Examiners) THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION, and JOSEPH J. HOGYA (intended to be the Institute for Continuing Legal Education Skills Training Course Director),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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125

QUESTIONS PRESENTED

The judgment below presents the following issues for review:

1. Does the United States Constitution permit a state to require lawyers duly licensed to practice law in the state to maintain a full-fledged office where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time?

2. Does such an in-state office requirement offend the dormant aspect of the Commerce Clause?

3. Does the United States Constitution permit a state to require lawyers duly licensed to practice law in the state and newly admitted to the state's bar to attend a two year long sequence of classes which are only offered within the borders of the state and which are usually presented on videotape which could just as well be presented outside the state or watched by lawyers on their own at home or in their offices?

PARTIES TO THE PROCEEDING

There are no parties to this case other than those appearing in the caption.

The defendant Robert W. Wilentz was at the time this action was commenced the Chief Judge of the Supreme Court of New Jersey. Since the commencement of this action, Judge Wilentz became ill and resigned from the bench. Subsequently, Judge Wilentz unfortunately passed away.[1]

After Judge Wilentz resigned from the bench, Deborah Poritz, who was the New Jersey Attorney General and who represented the state defendants in this action, was appointed Chief Judge of the Supreme Court of New Jersey.

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[1] The *New York Times* reported that Judge Wilentz died in his apartment in Manhattan. This is rather ironic, considering the position taken by the defendants in this case that in order to practice law in New Jersey a lawyer must have an office in New Jersey. If the Chief Judge could live in Manhattan and preside over a court in New Jersey, why should lawyers not be permitted to have their offices in Manhattan and practice in New Jersey?

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Petition for a Writ of Certiorari 1

Opinions Below 2

Statement of Jurisdiction 2

Statement of the Case 17

Reasons for Granting the Writ 29

Conclusion 39

Appendix

Decision of the Third Circuit 1a

Order of the District Court 41a

Report and Recommendation of the Magistrate Judge 43a

Statutes Involved 79a

United States Constitution, art. I, § 8, clause 3 ... 79a

N.J. Ct. R. 1:21-1 (1997) (current version) 80a

N.J. Ct. R. 1:21-1 (1995) (before June 28, 1996 amendment effective September 1, 1996) 86a

N.J. Ct. R. 1:26 ..... 92a

TABLE OF AUTHORITIES

Cases

Barnard v. Thorstenn, 489 U.S. 546, 555 (1989) 21

Brown-Forman Distillers Corp. v. New York Liquor Authority, 476 U.S. 573 (1986) 33-34

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 38

City of Philadelphia v. New Jersey, 437 U.S. 617, 614 (1978) 28

Frazier v. Heebe, 482 U.S. 641, 649 (1987) 21, 23, 31, 34-36

Institutional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 824 (3d Cir. 1994) 33

Matter of Kasson, 141 N.J. 83, 660 A.2d 1187 (1995) 36

Pike v. Bruce Church, 397 U.S. 137 (1970) 33-34

In re Sackman, 90 N.J. 521, 448 A.D.2d 1014 (1982) 31

Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 285 (1985) 22, 30, 32

Supreme Court of Virginia v. Friedman, 487 U.S. 59, 69 (1988) 31

Tolchin v. The Supreme Court of the State of New Jersey, 111 F.3d 1099 (3d Cir. 1997) ..... passim

Tolchin v. The Supreme Court of the State of New Jersey 1995 U.S. Dist. LEXIS 21518 (D.N.J. 1996) (Cavanaugh, U.S.M.J.) ..... passim

Constitutional Provisions, Statutes and Rules

U.S. CONST., art I, § 8, clause 3 ..... passim

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 17
42 U.S.C. § 1983 17
42 U.S.C. § 1985 17

New Jersey Constitution, art. 6, § 2, ¶ 3. 17

N.J. Ct. R. 1:21-1 (1997) ..... passim
N.J. Ct. R. 1:26 (1997) ..... passim

Del. Sup. Ct. R. 12(a)(i) 25

Other Authority

The Federalist No. 22 (Alexander Hamilton) 32-33

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ROBERT J. TOLCHIN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

-against-

SUPREME COURT OF NEW JERSEY, ROBERT N. WILENTZ (INTENDED TO BE THE CHIEF JUDGE OF THE SUPREME COURT OF NEW JERSEY), STEPHEN W. TOWNSEND (INTENDED TO BE THE CLERK OF THE SUPREME COURT OF NEW JERSEY), NEW JERSEY STATE BOARD OF BAR EXAMINERS, SAMUEL J. UBERMAN (INTENDED TO BE THE ASSISTANT SECRETARY OF THE NEW JERSEY SUPREME COURT WHO PLAINTIFF BELIEVES TO DIRECT THE STATE BOARD OF LAW EXAMINERS), NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION AND JOSEPH J. HOGYA (INTENDED TO BE THE INSTITUTE FOR CONTINUING LEGAL EDUCATION SKILLS TRAINING COURSE DIRECTOR),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of the judgment of the United States Court of Appeals for the Third Circuit, *Tolchin v. The Supreme Court of the State of New Jersey*, 111 F.3d 1099; 1997 U.S. App. LEXIS 9831 (3d Cir. 1997) (1a*), which affirmed the judgment of the United States District Court for the District of New Jersey dated December 14, 1995 (41a), which in turn adopted the report and recommendation of the Magistrate Judge, *Tolchin v. The Supreme Court of the State of New Jersey* 1995 U.S. Dist. LEXIS 21518 (D.N.J. 1996) (Cavanaugh, U.S.M.J.) (43a).

STATEMENT OF JURISDICTION

In seeking review of the judgment of the United States Court of Appeals for the Third Circuit, petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

The judgment which the plaintiff seeks to have reviewed was entered by the Clerk of the United States Court of Appeals for the Third Circuit on May 2, 1997, the same day as the opinion of that court was filed. This

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* Parenthetical page references denominated with an 'a' refer to pages of the appendix at the back of this petition.

petition is timely since it is being brought within 90 days of that date.

There have been no applications for rehearing.

STATEMENT OF THE CASE

Jurisdiction

This is a civil rights case arising under 42 U.S.C. §§ 1983 and 1985. Jurisdiction in the court of first instance was based on federal question jurisdiction, 28 U.S.C. § 1331, as this case arises under a federal statute and the United States Constitution.

Introduction

The State of New Jersey has vested the authority to regulate lawyers and the practice of law in the Supreme Court of the State of New Jersey ("New Jersey Supreme Court"). New Jersey Constitution, art. 6, § 2, ¶ 3. Exercising this authority, the New Jersey Supreme Court has adopted rules regulating the practice of law commonly known as the New Jersey Rules of Court.

Two of these rules are at issue in this case. The first, N.J. Ct. R. 1:21-1 (1997), more commonly known as the bona fide office rule, requires a lawyer holding a license to practice law in the State of New Jersey to maintain an office in the State of New Jersey, without regard to the needs of the lawyer's practice.

Few would be surprised to learn that a lawyer who wishes to practice law in the State of New Jersey must be graduated from an accredited law school, pass the New Jersey bar exam, pass the scrutiny of the character and fitness screening process and take an oath to support the laws of the State of New Jersey and the Constitution of the United States of America. Likewise, few would be surprised to learn that a lawyer who does not reside in New Jersey must designate the Clerk of the Supreme Court of the State of New Jersey ("New Jersey Supreme Court") as his or her agent for the service of process.

What many do find astonishing in this era of information technology, rapid communication, super-highways and jet air travel is that without regard to the nature of a particular lawyer's practice or the lawyer's geographic location, New Jersey requires duly licensed lawyers who wish to actually practice law in the State of New Jersey to maintain a "bona fide office" someplace within the State of New Jersey, N.J. Ct. R. 1:21-1 (1997), and to complete a series of courses which are only offered within the geographic borders of the State of New Jersey, N.J. Ct. R. 1:26 (1997). A lawyer who fails to comply with these requirements is given a status of "ineligible to practice" and is subject to disciplinary action if he or she should practice law within New Jersey.

The Bona Fide Office Rule

The office requirement cannot be satisfied by arranging for a maildrop or an answering service. The rule

requires a lawyer to maintain an actual office within the state where the lawyer can be reached and is actually present on a regular basis. A "bona fide office" is defined in the rule as:[1]

> more than a maildrop, a summer home that is unattended during a substantial portion of the year, an answering service unrelated to a place where business is conducted or a place where an on-site agent of the attorney receives and transmits messages only. For the purpose of this section, a bona fide office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.

N.J. Ct. R. 1:21-1 (1997).

This bona fide office requirement places an onerous burden on lawyers whose offices are located outside New Jersey and who wish to devote part of their time to

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[1] During the pendency of this action, the bona fide office rule was amended so that it is now even more stringent then it was at the time this action was commenced. The amended version was enacted on June 28, 1996 and became effective September 1, 1996, just ten days before this matter was argued in the Third Circuit. The Third Circuit was made aware of the amendment and its decision addressed the current version, rather than the older version which is no longer in effect. Both versions are reproduced for this Court in the "Statutes Involved" section of this petition.

practicing law in New Jersey. For example, a lawyer (such as the plaintiff in our case) with an office in Manhattan who holds a New Jersey license to practice law may wish to represent a long-standing New York client in a matter that requires him to practice law in New Jersey, such as a lawsuit pending in a New Jersey court, an arbitration venued in New Jersey, a federal administrative proceeding being held in New Jersey, a corporate merger closing in New Jersey or negotiation of a labor dispute with a labor union headquartered in New Jersey. Despite the fact that the Manhattan lawyer has relatively easy access to the entire northern part of the State of New Jersey and can in fact arrive at the Federal District Court in Newark within thirty minutes on the PATH train,[2] that lawyer is prohibited from undertaking such representation because he does not have an office in New Jersey. This office requirement is imposed notwithstanding the fact that the lawyer is every bit as able to represent his client from his New York office and his New York office is most convenient for his client. The result is that if this lawyer wishes to represent his client in New Jersey, he is compelled to hire a local New Jersey lawyer who need not actually do anything other than lend his name as counsel

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[2] The PATH train is a rail link under the Hudson River operated by the Port Authority of New York and New Jersey, a quasi-governmental authority jointly owned by the states of New York and New Jersey in recognition of the fact that New York and New Jersey comprise one economic market within which commerce must be facilitated rather than hindered as is the effect of the "bona fide office" requirement.

of record and his office address to satisfy the bona fide office rule.

This scenario may be both satisfactory and immensely profitable to lawyers with offices in New Jersey who are able to parlay their captive New Jersey market into a lucrative source of fees from the clients of out-of-state lawyers who have legal matters in New Jersey. However, this bona fide office rule improperly encroaches upon the Constitutional right of lawyers licensed to practice in New Jersey but who have offices outside New Jersey to conduct their business in New Jersey, and particularly offends the Constitution's Commerce Clause, U.S. CONST., art I, § 8, clause 3.

This litigation pressed the defendants to identify what purpose the bona fide office requirement serves and to make a showing that some legitimate state interest justifies the infringement of the right of lawyers with out-of-state offices to do business in New Jersey. The defendants took the position that the bona fide office rule is allegedly necessary in order to assure "competence, accountability and accessibility of attorneys for the benefit of clients, courts, counsel and parties." *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1109 (3d Cir. 1997) (21a).

Relying on this Court's decisions in *Frazier v. Heebe*, 482 U.S. 641, 649 (1987) ("the mere fact that an attorney has an office in [a jurisdiction] surely does not warrant the assumption that he or she is more competent than an out-of-state member of the state bar."), *Barnard v.*

Thorstenn, 489 U.S. 546, 555 (1989) ("We can assume that a lawyer who anticipates sufficient practice in[a jurisdiction] to justify taking the bar examination and paying the annual dues . . . will inform himself of the laws of the [jurisdiction].") and *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 (1985) (Court will not assume that "a nonresident lawyer — any more than a resident — would disserve his clients by failing to familiarize himself with the [local law]."), the Third Circuit rejected the defendants' arguments that the bona fide office requirement makes lawyers more competent. *Tolchin*, 111 F.3d at 1108-09, (20a).

The Third Circuit also rejected the defendants' argument that the bona fide office requirement increased attorney accountability, since New Jersey already requires all non-resident lawyers to designate the Clerk of the New Jersey Supreme Court as agent for service of process. *Tolchin*, 111 F.3d at 1109, (20a-21a) (citing N.J. Ct. R. 1:21-1(a)).

The Third Circuit nevertheless upheld the bona fide office requirement for reasons hinging entirely on the notion that requiring a lawyer to have an office in New Jersey somehow "has a rational relationship to the benefit of attorney accessibility for clients, courts, counsel and parties." *Tolchin*, 111 F.3d at 1009 (21a). The Court did not explain why requiring a lawyer licensed to practice in New Jersey but whose office is in Manhattan or Philadelphia to establish an office in New Jersey would

necessarily make the lawyer any more accessible to clients, courts, counsel or parties.

The obvious fallacy pervading the Third Circuit's reasoning is that requiring a lawyer to ensconce herself in an office somewhere in New Jersey does not necessarily make that lawyer more accessible than many lawyers with out-of-state offices. For example, a lawyer could satisfy the bona fide office requirement by having an office in Atlantic City, New Jersey, approximately two hours south of New York City, but that lawyer would be far less accessible to a court in a northern New Jersey city such as Newark, Jersey City or Hackensack than a lawyer with an office in Manhattan, who would be scarcely half an hour away. Similarly, a lawyer with offices in Philadelphia would be far more accessible to courts in southern New Jersey than a lawyer with an office satisfying the rule in northern New Jersey. If the rule required lawyers to have an office located within a specified number of miles from any courthouse where they wished to practice law, one could see how such a requirement would assure attorney accessibility. However, the rule followed in New Jersey does not bear a rational relationship to the ends of attorney accessibility. *See, Frazier* v. *Heebe,* 482 U.S. 641 2613 (1987) (holding that an in-state office requirement is "irrational").

It is indisputable that a New Jersey court wishing to communicate with a lawyer located out-of-state need only send a letter through the mail, send a fax or call on the telephone. The mails are no less reliable when they

cross state lines, faxes work just as well and inter-state telephone charges are no longer prohibitive as they were a generation or two ago.[3]

The Third Circuit also failed to consider that the vast majority of lawyers, other than trial lawyers, are not litigators and thus rarely, if ever, need to be accessible to a court in the first place. Lawyers who draft wills, trusts or contracts, negotiate real estate transactions or corporate mergers and acquisitions, practice corporate, securities, labor, or customs law, engage in tax planning or specialize in federal appellate advocacy almost never have matters that require them to be accessible to a New Jersey court. Similarly, specialized lawyers who engage in practice before federal administrative forums such as Veterans' Administration, Social Security or Immigration and Naturalization Service hearings have little reason to be required to be accessible to New Jersey courts. Yet all these lawyers are required by the bona fide office rule to maintain an office in New Jersey or be precluded from engaging in such practice of law in New Jersey.

In contrast, Delaware's parallel to New Jersey's bona fide office rule permits licensed lawyers with offices out-of-state to practice law within the State of Delaware, with the narrow caveat that all papers filed with a

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[3] This is particularly so between New York and New Jersey, where the same telephone company, NYNEX, serves the New York City metropolitan area, including the northern portion of New Jersey, in recognition of the fact that the northern half of New Jersey forms part of the same natural market as New York City.

Delaware court must be signed by an active member of the Delaware Bar who has an in-state address where papers can be served, i.e. not a post office box. DEL SUP. CT. R. 12(a)(i).

Requiring a lawyer to be present at an office in New Jersey also fails to enhance the lawyer's accessibility to her clients, particularly if her clients are also out-of-state. A lawyer with a license to practice law in New Jersey who has an office in Brooklyn, New York is obviously more accessible to her Brooklyn clients, who would find her most inaccessible if her office were located someplace in New Jersey. Similarly, requiring a lawyer who is in-house counsel for a corporation whose law office is located within the headquarters of the corporation in Manhattan to also maintain an office in New Jersey in order to represent that corporation in a proceeding in New Jersey does nothing to make that lawyer more accessible to her corporate client and is patently absurd.

This rule should also not be considered in a vacuum. The most recent version of this rule was promulgated in 1996, when fax machines, telephones, high-speed railroads and highways, conference calls, speakerphones, e-mail and cellular telephones had already been pervasive for many years. Even if the idea of requiring an office might have served to assure attorney accessibility in a bygone and slower era, the rule has become so unnecessary in today's world that it cannot be said to bear even a rational relationship to the ends of assuring attorney accessibility.

The plaintiff submits that the real motivation behind the bona fide office requirement is plain and simple economic protectionism: New Jersey's Bar establishment enacted these rules to protect local New Jersey lawyers and to promote full employment among local members of the New Jersey Bar of New Jersey. The New Jersey Bar is obviously concerned that the large firms in Manhattan and Philadelphia will simply hire lawyers who took the New Jersey bar exam and who are licensed to practice in New Jersey, rather than hire local New Jersey lawyers to serve as counsel of record. Even the Third Circuit recognized that "it may be true, as Tolchin argues, that the bona fide office requirement may include an element of economic protectionism," *Tolchin*, 111 F.3d at 1116 (39a). At the very least this question raises a question of fact that should have been left for the jury and should not have been decided by the court below on a summary judgment motion.

The Mandatory Attendance Rule

Besides imposing an oppressive in-state office requirement on duly licensed lawyers wishing to practice law in New Jersey, the defendants also impose a requirement that lawyers newly admitted to the New Jersey bar complete a two year series of continuing legal education classes called "Skills and Methods" that must be attended at locations within the state of New Jersey. N.J. Ct. R. 1:26 (1997). Failure to complete these courses

makes a lawyer ineligible to practice in New Jersey until the courses are completed. *Id.*

Skills and Methods classes are only offered within the State of New Jersey, frequently at remote points within the state. Only a handful of the lectures are presented with a live lecturer, and those few live lectures are straight lectures with no opportunity for questioning the lecturer. The vast majority of the classes are presented on video tape, and most participants complete the entire series of classes without ever seeing a live lecturer. The only evaluation of a student's performance in the courses is done on the basis of mail-in homework assignments that can clearly be done just as easily within or without the borders of the State of New Jersey.

There is a strict requirement that all participants in the Skills and Methods program attend the lectures. This requirement is called the mandatory attendance rule.

The defendants proffered absolutely no evidence showing that any state interest is served by requiring newly admitted lawyers to make weekly trips from wherever they live to a classroom in New Jersey to watch videotaped lectures. The same result could be achieved by simply selling or renting the videotapes to out-of-state lawyers who can then watch them at home, complete the homework and get the same educational benefit.

While the defendants argue that the mandatory attendance rule does not impose a great burden on out-of-state members of the New Jersey Bar, one need only consider the plight of a young lawyer who passed the

New Jersey bar exam immediately after law school, has become admitted to the New Jersey bar and who intends to practice law in New Jersey after completing a two year clerkship in the United States District Court for the Eastern District of Louisiana or the Northern District of New York. Because such a young lawyer cannot, practically speaking, attend the lectures which are offered only in New Jersey, he is destined to become ineligible to practice law in New Jersey and will foreclosed from practicing there. The same would apply to a lawyer with many years experience from another state who wished to move to New Jersey.

The result of the mandatory attendance requirement is that the New Jersey market for legal services is reserved for local New Jersey lawyers. This is exactly what the Commerce Clause was intended to prevent. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 614 (1978) ("[R]egulations that operate as economic protectionism and serve to protect in-state economic interests at the expense of out-of-state competitors are per se invalid.")

The rule that imposes the Skills and Methods requirement also directs the defendant New Jersey State Board of Law Examiners to promulgate rules governing this course, including a curriculum. The defendants admit that no such rules were ever promulgated. The course is administered by the defendant Institute for Continuing Legal Education ("ICLE") according to an *ad hoc*

arrangement with the defendant New Jersey Supreme Court.

Obviously, if there were a defined curriculum for the course and a written list of requirements, it would be a simple matter for law schools and bar associations around the country to offer courses satisfying the Skills and Methods requirement. Indeed, the record contains the affidavit of a past president of the New York State Trial Lawyers Association who states that if there were such a curriculum available, his organization would offer a New Jersey Skills and Methods course in New York.

However, because there is no defined curriculum or rules governing the course, the only organization in the world which offers this course is the defendant ICLE.

REASONS FOR GRANTING THE WRIT

This case raises for this Court's review the constitutionality of two rules adopted by a state court in its regulatory capacity that substantially hinder the ability of lawyers to engage in interstate commerce in the practice of law. This Court has never reviewed these rules nor any similar rules.

In deciding to uphold these burdensome and restrictive New Jersey regulations, the Third Circuit decided an important question of federal law that has not been, but should be, settled by this Court.

Twelve years ago, this Court adjudged as unconstitutional a New Hampshire regulation prohibiting duly licensed lawyers from practicing law in New Hampshire if they did not reside in New Hampshire. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). In his opinion concurring in result, Justice White wrote "I would postpone to another day such questions as whether the State may constitutionally condition membership in the New Hampshire Bar upon maintaining an office for the practice of law in the State of New Hampshire." *Id.*, 470 U.S. at 289 (White, J.) (concurring in result).

The petitioner respectfully submits that the future day referred to by Justice White for determining the validity of in-state office requirements has now come. The arrival of this day has been heralded by the defendants' having increased the stringency of their enforcement of the bona fide office rule and their having actually re-written the bona fide office rule to make it even more difficult for New Jersey licensed lawyers practicing in another state to comply with since the commencement of this action. There are thousands of lawyers licensed to practice law in New Jersey but whose primary offices are located outside New Jersey and who are therefore impacted by this rule and the defendants' increased enforcement of this rule. This rule is now quite ripe for review by this Court.

It should be noted that the *Piper* case did not involve a in-state office rule. The rule being challenged in

Piper was purely a residency requirement. Nevertheless, Justice White's comment was prescient since he obviously foresaw that once residency requirements for practicing law were held to be unconstitutional, states might adopt in-state office requirements as a fallback line of protectionism. This is exactly what New Jersey did after the New Jersey Supreme Court declared "unreasonable" New Jersey's previous requirement that non-resident attorneys maintain a "principal office" within New Jersey. *In re Sackman*, 90 N.J. 521, 448 A.D.2d 1014 (1982). Since in-state office requirements were not raised in the *Piper* case, the Court quite properly did not consider them.

This is the only case that the petitioner is aware of dealing with an in-state office requirement.

Similarly, New Jersey's requirement that newly admitted lawyers complete a two year sequence of classes that can only be taken in New Jersey—where they are almost always presented on videotape in a classroom—imposes a constitutionally unacceptable burden on newly admitted lawyers who do not reside in or very close to New Jersey. This issue has never been reviewed by this Court.

This issue is also particularly ripe for review because the Third Circuit based its decision upholding the mandatory attendance requirement on what the Third Circuit acknowledged was dicta repeated in three decisions of this Court which articulated approval of a requirement of mandatory attendance at legal education seminars.

Tolchin, 111 F.3d at 1109-10, n.4 and n5 (22a, 24a). However, nothing in any of those three cases, *Supreme Court of Virginia* v. *Friedman*, 487 U.S. 59, 69 (1988); *Frazier* v. *Heebe*, 482 U.S. 641, 648, (1987); *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 285 n.19 (1985), indicates this Court's approval of a requirement that newly admitted out-of-state lawyers attend a two year sequence of lectures offered only at locations within New Jersey. These other decisions contemplated the approval only of a continuing legal education requirement—which is indisputably a laudable objective—and perhaps at most an occasional requirement of attendance at an in-state seminar. The reliance placed on these decisions by the Third Circuit is a perversion of what this Court appears to have intended in writing the dicta contained in *Friedman*, *Frazier* and *Piper*. Such a mis-application of this Court's holdings beckons now for review.

The two New Jersey requirements that the Third Circuit's decision upheld are both offensive to the freedom of commerce for goods and services between the states envisioned by the framers of the Commerce Clause. As Alexander Hamilton wrote in The Federalist, No. XXII:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse

> between the different parts of the Confederacy. «The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless.» Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.

THE FEDERALIST NO. 22 (Alexander Hamilton) (footnote omitted).

The Third Circuit recognized in its decision that well-established precedent holds that a state regulation imposing a burden on interstate commerce which is excessive in comparison to the local benefits achieved violates the Commerce Clause. *Tolchin*, 111 F.3d at 1107 (14a). *See Pike v. Bruce Church*, 397 U.S. 137 (1970). The Third Circuit also recognized that:

> when a state statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," it may generally be struck down without further inquiry. *[Brown-Forman Distillers Corp. v. New York Liquor Authority,]* 476 U.S. [573] at 578-79 [(1986)]; *see also Institutional Sys., Inc. v.*

> *Computer Curriculum Corp.*, 35 F.3d 813, 824 (3d Cir. 1994). On the other hand, when a statute only indirectly affects interstate commerce and regulates evenhandedly, a determination must be made as to whether the State's interest is "legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (citing *Pike*, 397 U.S. at 142). In both cases, however, "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*

Tolchin, 111 F.3d at 1106 (14a).

There is little doubt that if heightened scrutiny were applied to the regulations at issue, the regulations, particularly the bona fide office rule, would have to be stricken since they clearly place a burden on interstate trade.

However, even applying the more lenient standard of review applied by the Third Circuit—whether the regulations bear a rational relationship to a legitimate local purpose, *see Pike*, 397 U.S. at 142—these regulations should have been stricken.

Indeed, the Third Circuit's decision that the bona fide office rule was rationally related to the local objective of assuring attorney accessibility to local courts, clients, parties and lawyers, *see Tolchin*, 111 F.3d at 1109 (21a), directly contradicts the holding of this Court in *Frazier v. Heebe*, 482 U.S. 641. In that case, this Court was presented with a challenge to a local rule of the United States District Court for the Eastern District of Louisiana

which required attorneys who did not reside in the District to maintain an office within the geographic borders of the District in order to be a member of the bar of that court. The defendants in *Frazier* attempted to justify their in-state office requirement on grounds that were substantially similar to the four grounds relied upon by the defendants and the Third Circuit in our case. Nevertheless, this Court rejected the *Frazier* in-state office requirement, and found in language directly applicable to the case at bar:

> the in-state office requirement [is] unnecessary and irrational. First, the requirement is not imposed on in-state attorneys. A resident lawyer is allowed to maintain his or her only office outside of Louisiana. A resident lawyer with an out-of-state office is equally as unavailable to the court as a nonresident lawyer with an out-of-state office. In addition, the mere fact that an attorney has an office in Louisiana surely does not warrant the assumption that he or she is more competent than an out-of-state member of the state bar. Requiring petitioner to have a Louisiana address and telephone number and an in-state answering service will not elevate his or her understanding of the local Rules. As the failure to require in-state attorneys to have an in-state office reveals, the location of a lawyer's office simply has nothing to do with his or her intellectual ability or experience in litigating cases in Federal District Court.
>
> We further conclude that any need the court may have to ensure the availability of attorneys

> does not justify the in-state office requirement. As observed with regard to state residency requirements, there is no link between residency within a state and proximity to a courthouse. The office requirement does not specify that counsel *be* in the Eastern District, but only that the attorney have an office somewhere in the state, regardless of how far that office is from the courthouse. Thus, we conclude that neither the residency requirement nor the office requirement of the local Rules is justified.

Id., 482 U.S. at 649-650, 107 S.Ct. 2607 (1987) (underline added, italics in original).

While the New Jersey requirements, unlike the Louisiana requirements dealt with in *Frazier*, do not exempt New Jersey residents from the office requirement,[4] this Court's perceptive analysis in *Frazier*

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[4] While the New Jersey requirements do not today exclude non-residents of New Jersey from practice, the regulatory history of the rule being challenged here reveals that in fact non-domiciliaries of New Jersey were excluded from the practice of law there until 1969, when the rule was changed to a requirement of either domicile in New Jersey or the maintenance of one's principal office in New Jersey, a requirement slightly more onerous than the one found to be irrational in *Frazier*. It was not until 1978 that the rule was changed to its present form, except that the portion defining what a "bona fide office" is was not added until 1981. *See Matter of Kasson*, 141 N.J. 83 660 A.2d 1187 (1995) Thus, the history of the regulation now at issue demonstrates that the current rule was spawned from a lineage of outrightly protectionist measures that facially discriminated based on state residence, in violation of the Privileges and Immunities Clause.

As explained by the New Jersey Supreme Court, "The additional [bona fide office] requirement was seen as a means of controlling the occasional practice of law by domiciliaries who

(continued next page)

of the lack of any rational reason to require a lawyer to maintain an office within in a jurisdiction as a precondition to membership in that jurisdiction's bar is completely applicable to this case. As was observed in *Frazier*, the mere fact that a lawyer such as the plaintiff might rent an office in New Jersey, install a telephone, hire a secretary and even seat himself at a desk in that office on a scheduled basis does not bestow on that lawyer any advantage. All it does is create a built-in inconvenience for any lawyer who wants to practice in New Jersey, and makes many lawyers think twice about becoming admitted to practice in New Jersey.

Likewise, the mandatory attendance requirement simply throws up an obstacle inhibiting and discouraging lawyers with offices outside of New Jersey from becoming admitted to the New Jersey Bar and/or practicing law in New Jersey. The record in this case contains no showing whatsoever that there is any benefit obtained from requiring out-of-state lawyers to journey into New Jersey for the purpose of watching a videotape in a classroom located in New Jersey. Indeed, what the record does contain is the unrefuted affidavit of Frank Macchiarola, Ph.D., an expert in legal education, [now former] law school dean, former law professor and former Chancellor of the New York City Board of Education, who stated

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primarily practiced in other jurisdictions or who practiced law only sporadically in New Jersey", *Kasson*, 141 N.J. at 90, 448 A.2d at 1017 (citing Pressler, Current N.J. Court Rules, Comment 1:21-1 (1982)). Clearly, this is as protectionist a motive as any other tariff designed to control the market and serves no other legitimate function.

categorically that there were no educational benefits to be obtained from watching a videotape in a classroom in New Jersey as compared to being permitted to watch the same videotapes at a classroom outside New Jersey or in one's own home or office.

The decision of the Third Circuit should be reviewed by this Court since it reached conclusions regarding state regulation of the interstate practice of law that have never been addressed by this Court. These regulations implicate the dormant aspect of the Commerce Clause and thus raise important questions of federal law.

This matter is appropriate for review by this Court also because of the great many people who are impacted by the regulations being challenged here. There are tens of thousands of lawyers in the New York and Philadelphia metropolitan areas, and thousands of law firms. Many of these lawyers and law firms are forced to maintain New Jersey offices that they would not otherwise maintain if it were not for the burden imposed by this rule. Many more lawyers and law firms are forced by these regulations to forego undertaking representation of clients when the matters would require practicing law in New Jersey. On the other side of the issue, thousands of New Jersey local lawyers are making monopolists' profits by taking advantage of the infringement of free commerce between the states that is engendered by these regulations.

Finally, it should be noted that this matter is particularly worthy of review by this Court since the

regulations at issue here, unlike the run-of-the-mill social or economic legislation with respect to which states enjoy wide latitude, will not likely "eventually be rectified by the democratic process," *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). These protectionist rules were made by non-legislative fiat of the Supreme Court of New Jersey, which is comprised entirely of local New Jersey lawyers, and were cleverly crafted to place no significant burdens upon the members of the local New Jersey bar while at the same time burdening lawyers from other states who may wish to practice in New Jersey.

Ordinary lawyers, out-of-state or in-state, have little to no voice at all in making these rules, and it is extremely unlikely that out-of-state lawyers would be able to convince the New Jersey Supreme Court to even consider repealing these rules, which have the locally popular protectionist effect of excluding non-New Jersey lawyers from practicing in New Jersey and of preserving New Jersey as a fiefdom where local lawyers do not have to compete with out-of-state lawyers who are members of the New Jersey bar, although such lawyers—particularly New York and Philadelphia lawyers—may be perfectly able to handle cases in New Jersey. Since any undue burdens created by these rules are unlikely to be ever rectified by legislative means," this Court should review this case.

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that this Court grant a writ of certiorari to the United States Circuit Court for the Third Circuit.

Dated: New York, New York
July 30, 1997

Respectfully submitted,

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APPENDIX

Decision of the United States Court of Appeals

for the Third Circuit

No. 95-5883

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated

Appellant,

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY; ROBERT WILENTZ (intended to be the Chief Judge of the Supreme Court of New Jersey); STEPHEN W. TOWNSEND (intended to be the clerk of the Supreme Court); THE NEW JERSEY STATE BOARD OF BAR EXAMINERS; SAMUEL J. UBERMAN (intended to be the Assistant Secretary of the New Jersey Supreme Court who plaintiff believes to direct the State Board of Bar Examiners); THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION; JOSEPH J. HOGYA (intended to be the Institute for Continuing Legal Education Skills Training Course Director)

APPEAL FROM THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 94-cv-04860)

ARGUED SEPTEMBER 10, 1996

BEFORE: SLOVITER, *Chief Judge*, COWEN and LEWIS, *Circuit Judges*.

(Filed May 2, 1997)

OPINION OF THE COURT

LEWIS, *Circuit Judge*.

To practice law in New Jersey, an otherwise qualified attorney must maintain an office and attend continuing legal education courses there. The question before us is whether such requirements are lawful. We conclude that they are, and thus will affirm the district court's grant of summary judgment in favor of the Appellees. I. Rule 1:21-1(a) of the Rules Governing the Courts of the State of New Jersey (the "Rule") indicates who may practice and appear in New Jersey courts. The New Jersey Supreme Court amended this Rule, effective September 1, 1996, while this appeal was pending. The

Rule now states that

> no person shall practice law in this State unless that person is an attorney, holding a plenary license to practice in this State, has complied with the R.1:26 *skills and methods course requirement* in effect on the date of the attorney's admission, is in good standing, and *maintains a bona fide office* for the practice of law in this State regardless of where the attorney is domiciled.

N.J.Ct.R. 1:21-1(a) (1996) (emphasis added).

A.

The Bona Fide Office Requirement

The Rule defines "bona fide office" as "more than a maildrop, a summer home that is unattended during a substantial portion of the year, an answering service unrelated to a place where business is conducted, or a place where an on-site agent of the attorney receives and transmits messages only." *Id.*

The Rule also outlines some indicia of a bona fide office. It

> is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be

obtained within a reasonable period of time.

Id.

The bona fide office requirement is the successor to New Jersey's more stringent residency requirement for members of the New Jersey bar. Indeed, as we discuss below, over the years New Jersey has sought to diminish the disparity in treatment between resident and nonresident attorneys. Moreover, the history of New Jersey's residency and bona fide office requirements demonstrates the interests at stake in this case. As we will explain, each revision has sought to strike a different balance of the public interest, the interests of the New Jersey bar and the interests of potential members of the bar. Because those interests are at the core of the dispute in this case, we will briefly trace the relevant history and meaning of the various revisions to the Rule.

At the outset we note that until 1969, New Jersey required that attorneys be residents of New Jersey in order to practice there. *In re Sackman*, 448 A.2d 1014, 1017 (1982); *see* Pressler, Current New Jersey Court Rules, Comment R. 1:21-1 (1969). The rationale for this requirement was that "residence in New Jersey implies a community commitment in terms of both interest and activity which better serves local clients and their interests." Editorial, Proposed Revision of the Rules of the Court, 90 N.J.L.J. 164 (1967) ("1967 Editorial"). Supporters of the residency requirement maintained that it ensured that the general public had access to qualified and committed counsel. *Id.* But while the residency

requirement was in effect until 1969, the New Jersey Supreme Court had been considering revising it since 1960.

In 1960, the New Jersey Supreme Court appointed the Coordinating Committee on the Revision of the Rules of Court to review the state's rules of court, including the residency requirement. *Sackman*, 448 A.2d at 1017.

In 1966, The Committee recommended that the residence requirement be modified so that a nonresident attorney could practice law in New Jersey as long as he or she was "in regular attendance at an office in this state maintained for the practice of law." 1967 Editorial; *see Sackman*, 448 A.2d at 1017. This proposed revision was intended to benefit attorneys who chose to live in New York or Pennsylvania and to practice in New Jersey. 1967 Editorial. These attorneys argued that the residency requirement placed an unreasonable restriction on their choice of residence because they were equally — if not more — qualified to practice in New Jersey than resident attorneys who primarily practiced in another state. *Id.* The proposed revision was tailored to prevent the occasional practice of law by those who practiced primarily in another state. *Sackman*, 448 A.2d at 1017.

The 1966 recommendation was criticized for several reasons. First, it was unclear what "regular attendance" meant. 1967 Editorial. Critics suggested that the proposed revision would allow attorneys who predominantly practiced in New York or Philadelphia to meet the requirement by attending a New Jersey office on

a regular but infrequent basis. *Id.* Furthermore, some members of the New Jersey bar feared that this revision would make it more difficult for people to secure qualified and committed counsel. *Id.* They believed that New Jersey residents would be better served by local counsel who would be "presumably, better equipped, in terms of currency and facility with New Jersey law and practice." *Id.* Finally, the proposal was criticized because of its "adverse impact on the economic interests of the New Jersey bar . . . ." *Id.* The proposal was not implemented.

In 1969, the Coordinating Committee proposed another revision which allowed any attorney to practice in New Jersey who was either domiciled there or maintained his or her principal office there. *Sackman*, 448 A.2d at 1017. While allowing for a more expansive choice of residence for members of the New Jersey bar, this recommendation implicitly rejected the possibility of attorneys engaging in multi-state practice. *Id.* The New Jersey Supreme Court implemented this recommendation. *Id.*

However, the 1969 Rule failed to limit multi-state practice completely. Some attorneys practiced in New Jersey by virtue of their residency in the state, but did not maintain a bona fide office there either because their office was in another state or because their New Jersey practice was irregular. Pressler, Current New Jersey Court Rules, Comment R. 1:21-1 (1982).

Thus, effective September 1978, the Rule was amended again to require that a resident attorney maintain

a bona fide office in New Jersey and that a nonresident attorney maintain his or her principal office there. *Id.* This version of the Rule was more restrictive of nonresidents than of residents because only the former had to maintain their principal offices in New Jersey. As a result of this requirement, a nonresident attorney's New Jersey practice could not be subordinate to a practice in another state. *Id.*

"Bona fide office" was not defined in the 1978 Rule, leading to another amendment in September, 1981. This amendment defined a bona fide office as

> a place where the attorney or a responsible person acting on his behalf can be reached in person and by telephone during normal business hours. A bona fide office is more than a maildrop, a summer home that is unattended during a substantial portion of the year, or an answering service unrelated to a place where business is conducted.

Sackman, 448 A.2d at 1018; N.J.Ct.R. 1:21-1(a) (1983).

In 1982, the New Jersey Supreme Court, as part of its decision in *Sackman*, amended the Rule again in order to excise the facial discrimination against nonresidents. Under the revised Rule, both residents and nonresidents had to maintain bona fide offices in New Jersey in order to practice there. *Sackman*, 448 A.2d at 1019.

Before the *Sackman* revision, the Rule presumed that without a principal office in New Jersey, an attorney would lose contact with New Jersey law and procedure, and would therefore be unable to serve clients competently. *Id.* But the Court observed that to the extent

this premise might be true, it is only marginally true. *Id.* at 1021. The Court concluded that "the public would be better served if licensed New Jersey attorneys residing, for example, in New York and Philadelphia were subject to no greater restrictions in their practice in New Jersey than those residing in Newark and Camden" because more qualified attorneys would be available to the New Jersey public. *Id.* at 1019.

From 1982 to 1996, the only official changes made to the Rule were not substantive. However, in 1994, following a formal hearing concerning a bar member who had attempted to satisfy the bona fide office requirement by renting, but not actually using, office space in New Jersey, the Committee on Attorney Advertising, appointed by the New Jersey Supreme Court, issued Opinion 19 to clearly define "bona fide office." 138 N.J.L.J. 320. The Committee recommended that the attorney be disciplined and stated that a bona fide office had to be "a place where clients are met, files are kept, the telephone is answered, mail is received and a responsible person acting on the attorney's behalf can be reached during normal business hours." *Id.* In 1996, the New Jersey Supreme Court adopted the substance of Opinion 19 in its revision of the Rule. N.J.Ct.R. 1:21-1 (1996).

Thus, there is no question that over the last few decades, New Jersey has sought to reduce facial discrimination against nonresident attorneys. There is also no question that the bona fide office requirement imposes at least some restriction on all attorneys who

wish to practice in New Jersey. One of the issues in this appeal is the extent to which these restrictions impose a burden that unconstitutionally discriminates against nonresident attorneys.

B.

The Continuing Legal Education Mandatory Attendance Requirement

In addition to the bona fide office requirement, successful completion of the skills and methods course on New Jersey practice is required for all attorneys recently admitted to the New Jersey bar. N.J.Ct.R. 1:26. The course is intended to prepare attorneys for the transition to legal practice in New Jersey from law school or from legal practice in another state. The New Jersey Supreme Court approved the New Jersey Institute for Continuing Legal Education ("ICLE") to administer this course.

In January 1987, the New Jersey Supreme Court directed ICLE to enforce a mandatory attendance policy for all registrants of the skills and methods course (the "mandatory attendance requirement"). ICLE implemented this directive after an extensive evaluation that included public notice of the proposal. ICLE currently offers the skills and methods course in four cycles throughout the year in three different scheduling formats. Newly admitted attorneys are free to choose the most convenient course cycle and format. The first year requirement for the course requires an attorney to attend 40 hours of lectures.

Attendance is mandatory in all cycles and formats. Rule 1:26 provides that "failure to complete the course successfully shall render an attorney ineligible to practice law."

II.

Appellant Robert Tolchin is a resident of New York State. He graduated from Cardozo Law School in 1992, sat for and passed the New Jersey Bar Exam in July, 1992, and was sworn in to the New Jersey bar in December, 1992. Tolchin contacted ICLE and asked whether he could satisfy the skills and methods course requirement through equivalent courses offered in New York or through home study materials. ICLE informed him that he must physically attend the courses in New Jersey. Tolchin has not attended the courses, nor does he maintain an office in New Jersey. As a consequence, Tolchin has not satisfied the conditions necessary to practice law in New Jersey, even though he has been sworn in to the New Jersey bar.

Tolchin filed suit on October 12, 1994, pursuant to 42 U.S.C. §§ 1983 and 1985. The suit raises a myriad of constitutional challenges to the bona fide office and the mandatory attendance requirements. Specifically, Tolchin argues that the bona fide office and the mandatory attendance requirements violate the Commerce Clause, the Privileges and Immunities Clause of Article IV, section 2, and the Equal Protection Clause of the Fourteenth

Amendment to the Constitution. He also argues that the implementation and teaching of the skills and methods course violate the Due Process Clause of the Fourteenth Amendment to the Constitution.[1] Tolchin named as defendants (1) the Supreme Court of New Jersey; (2) Chief Justice Robert N. Wilentz;[2] (3) the Clerk of the Supreme Court of New Jersey, Stephen W. Townsend; (4) the New Jersey Board of Bar Examiners; (5) the Board's Secretary, Samuel J. Uberman; (6) ICLE; and (7) Skills and Methods Course Director Joseph J. Hogya (collectively the "Appellees").

The Appellees filed a motion for summary judgment. The district court referred the case to a magistrate judge. The magistrate judge filed a Report and Recommendation which recommended that summary judgment be granted. The district court adopted the report and recommendation and entered summary judgment in favor of the Appellees. Tolchin then filed this appeal. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

As this is an appeal from the district court's Order granting summary judgment to Appellees, we conduct a *de novo* review. *Pennsylvania Coal Ass'n* v. *Babbitt*, 63 F.3d

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[1] Tolchin also argues that ICLE's application for summary judgment under the Eleventh Amendment should be denied; the individual defendants are proper parties; and summary judgment should be granted in his favor. Because of our disposition of the merits, we need not consider these issues.

[2] Chief Justice Wilentz resigned on July 1, 1996. He has been succeeded as Chief Justice by Deborah T. Poritz.

231, 236 (3d Cir. 1995). We must apply the same test used by the district court; namely, whether there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Hersh v. Allen Products Co.*, 789 F.2d 230, 232 (3d Cir. 1986). In determining whether to grant a motion for summary judgment, we must draw all reasonable inferences in favor of Tolchin, as the non-moving party. *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983).

III.

A.

Tolchin's Commerce Clause Challenge

Tolchin argues that the district court erroneously dismissed his Commerce Clause challenge to the bona fide office and the mandatory attendance requirements. He states that "the defendants have implemented regulations that unconstitutionally impair interstate commerce without sufficient justification and have thus violated the 'dormant' facet of the Commerce Clause." Tolchin Br. at 16.

The United States Constitution provides that "Congress shall have Power . . . to regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. While the Commerce Clause explicitly speaks only to the power of Congress to regulate interstate commerce, it has been interpreted to contain "an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 652 (1981). This implied limitation is sometimes referred to as the 'negative' or 'dormant' Commerce Clause, and it is this aspect of Commerce Clause jurisprudence that is at issue in this case.

The dormant aspect of the Commerce Clause "prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). State legislative enactments, executive regulations and judiciary-approved rules can all be subject to Commerce Clause analysis. *See e.g., New Energy*, 486 U.S. 269 (statute); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (executive order); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (judiciary-approved rule).

When conducting a dormant Commerce Clause analysis, we seek to balance the national interest in vibrant interstate commerce with the local interests

promoted by the state regulation. In *Pike*, the Supreme Court stated that

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld *unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits*. . . . If a legitimate local purpose is found, then the question becomes one of degree.

397 U.S. at 142 (citation omitted) (emphasis added).

In *Brown-Forman Distillers Corp. v. New York Liquor Authority*, 476 U.S. 573 (1986), the Supreme Court later refined its Commerce Clause analysis by holding that when a state statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," it may generally be struck down without further inquiry. 476 U.S. at 578-79; *see also Institutional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 824 (3d Cir. 1994). On the other hand, when a statute only indirectly affects interstate commerce and regulates evenhandedly, a determination must be made as to whether the State's interest is "legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (citing *Pike*, 397 U.S. at 142). In both cases, however, "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*

In this case, the district court, adopting in full the

Magistrate's Report and Recommendation, applied the second — the "balancing rule" — standard, which it formulated as follows:

> if legislation is *facially neutral*, and only has an incidental effect on commerce, the legislation will be upheld unless the burden on commerce is "clearly excessive in relation to the putative local benefits."

Report and Recommendation of Magistrate Judge at 21 ("Magistrate Report") (emphasis added) (quoting *Pike*, 397 U.S. at 142) (adopted by district court in *Tolchin v. Supreme Court of the State of New Jersey*, No. 94-4860 (D.N.J. Dec. 14, 1995)).

Although we agree with the district court's selection of the balancing rule test and its result, we disagree with its articulation of the test. For the balancing rule test to apply, a state's action must not be merely 'facially neutral,' but must also be neutral in effect. *Brown-Forman* makes clear that heightened scrutiny applies not only when legislation is facially discriminatory, but also when a state statute or regulation's "effect is to favor in-state economic interests over out-of-state interests. . . ." 476 U.S. at 579.

2.

Tolchin argues that the bona fide office and mandatory attendance requirements favor in-state economic interests and amount to "economic

protectionism" that must be subject to the Commerce Clause's heightened scrutiny standard of review. Just as a law forbidding sleeping under a bridge falls more heavily on the shoulders of the indigent than on those of the wealthy, Tolchin argues, these requirements fall more heavily on the shoulders of nonresidents than on those of residents.

This analogy sheds little light on the issue before us. Most laws and regulations affect different people differently, depending on their circumstances. The relevant question here is whether there is any differential treatment of nonresident attorneys that "favors in-state interests over out-of-state interests" and "the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman,* 476 U.S. at 579.

All parties agree that, on its face, New Jersey's bona fide office requirement does not discriminate against out-of-state attorneys. *See* N.J.Ct.R. 1:21-1(a). However, Tolchin maintains that the bona fide office requirement effectively favors resident attorneys. We disagree. All attorneys who wish to practice in New Jersey must have a bona fide office. As one commentator has observed, the requirement's intent was to prevent occasional practice in New Jersey by an attorney once admitted, but who now practices primarily in another state. Pressler, Current New Jersey Court Rules, Comment R. 1:21-1. Such an attorney could lose his or her familiarity with New Jersey law and its development. *Id.* Thus, it is reasonable to

assume that the only attorneys actually burdened by this requirement are those who wish to maintain a small or sporadic practice in New Jersey. Tolchin argues that although such attorneys are required to spend the money necessary to maintain a bona fide office, they will not receive the comparable benefits that most attorneys with larger New Jersey practices would enjoy. While Tolchin might be right, his argument fails to implicate the Commerce Clause because such attorneys may be New Jersey residents as well as nonresidents.

Tolchin has also argued that it is less expensive for New Jersey residents to have a bona fide office because they can maintain one in their homes. Yet, a bona fide office is more than a mere address — it is a functioning office. Tolchin has not shown that more than a few attorneys practice from their homes, so that any advantage which inures to resident attorneys in this regard is minimal. All attorneys must incur some expense in order to comply with this requirement. Any incidental discrimination caused by the bona fide office requirement is not based on residency status, but on the size and type of an attorney's practice.

We reach the same conclusion with respect to New Jersey's mandatory attendance requirement, which does not discriminate on its face nor in effect against out-of-state interests any more than the bona fide office requirement. It, too, applies equally on its face to residents and nonresidents and does not effectively favor resident attorneys. Rather, any burden it imposes is directly

proportional to the distance an attorney must travel to a skills and methods course site. Tolchin implicitly acknowledges that he is no more personally burdened by this requirement than many New Jersey attorneys, as he repeatedly notes how close New York is to New Jersey. While it is true that the mandatory attendance requirement may present difficulties for those residing hundreds or thousands of miles from New Jersey, we believe it is safe to assume that few attorneys live that far from where they intend to practice. *See Frazier v. Heebe*, 482 U.S. 641, 648-49 (1987) ("As a practical matter, a high percentage of nonresident attorneys willing to take the state bar examination and pay the annual dues will reside in places 'reasonably convenient' to the" court.); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 286-87 (1985) ("One may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire."). We do not believe that the mandatory attendance requirement was purposefully intended to discriminate against the putative class of attorneys who intend to practice a great distance from New Jersey. It is safe to assume that most of the attorneys affected by this regulation are residents of New Jersey, New York and Pennsylvania.

We conclude that neither the bona fide office nor the mandatory attendance requirement – purposefully or arbitrarily discriminate against out-of-state interests.

Because the bona fide office and the mandatory attendance requirements do not directly regulate or discriminate against interstate commerce, the heightened scrutiny test is not applicable. *See Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 824 (3d Cir. 1994). Thus, this case is distinguishable from the Commerce Clause cases that have applied heightened scrutiny to waste flow control ordinances. The Supreme Court has found that flow control ordinances have the effect of depriving "competitors, including out-of-state firms, of access to a local market. . . ." *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1679 (1994); *see also Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995). Because we have found no such deprivation, those cases do not mandate that we apply heightened scrutiny here. Accordingly, the district court was correct in applying the balancing rule test. Under this test, we must compare the local benefits of a regulation with the incidental burdens that it imposes on interstate commerce in order to determine whether the burdens are clearly excessive. *Id.*

Appellee New Jersey Supreme Court argues that the bona fide office requirement has the benefits of assuring the competence, accountability and accessibility of attorneys for the benefit of clients, courts, counsel and parties. Tolchin responds that there is no rational relationship between these benefits and the bona fide office

requirement. While we agree with Tolchin's analysis in part, we nonetheless find that a rational relationship exists between the benefit of attorney accessibility and the bona fide office requirement.

In a case where in-state offices were required only of nonresidents, the United States Supreme Court held that there is no rational relationship between such a requirement and attorney competence. *Frazier v. Heebe,* 482 U.S. 641, 649 (1987) ("the mere fact that an attorney has an office in [a jurisdiction] surely does not warrant the assumption that he or she is more competent than an out-of-state member of the state bar."); *see also Barnard v. Thorstenn,* 489 U.S. 546, 555 (1989) ("We can assume that a lawyer who anticipates sufficient practice in[a jurisdiction] to justify taking the bar examination and paying the annual dues . . . will inform himself of the laws of the [jurisdiction]."); *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 285 (1985) (Court will not assume that "a nonresident lawyer — any more than a resident — would disserve his clients by failing to familiarize himself with the [local law]."). We believe that this holds true for the facts presented in this case as well. The Appellees have put forth no credible arguments as to why the bona fide office requirement would make an attorney more competent.

Nor do we find that New Jersey's bona fide office requirement increases attorney accountability. New Jersey requires that all nonresident attorneys designate the Clerk of the New Jersey Supreme Court as agent for

receipt of service of process. N.J.Ct.R. 1:21-1(a). The New Jersey Supreme Court can therefore discipline all members of the New Jersey bar, regardless of residency. The Appellees make no compelling argument as to how New Jersey's bona fide office requirement is rationally related to attorney accountability.

However, we do believe that the bona fide office requirement has a rational relationship to the benefit of attorney accessibility for clients, courts, counsel and parties, and our belief is borne out by a New Jersey case which highlights the problems caused by attorneys who fail to maintain bona fide offices in New Jersey. In *In The Matter of Kasson*, 141 N.J. 83 660 A.2d 1187 (1995), the New Jersey Supreme Court upheld the disciplining of an attorney pursuant to Rule 1:21-1(a) because the trial court had serious difficulty locating him during the course of litigation. *Kasson*'s New Jersey office was never used, his name was misspelled on a sign and the office number on his letterhead was not the same as the number on the sign, which was not the same as the number of the actual office. *Id. See also* Opinion 19, above, pp. 11-12 (disciplining a bar member for renting, but not using, office in New Jersey). In our view, this case demonstrates that there is satisfactory basis to find a rational relationship between the bona fide office requirement and the intended benefit of attorney accessibility.[3]

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[3] Chief Judge Sloviter agrees that the bona fide office requirement has a rational relationship to the benefit of attorney accessibility for clients, courts, counsel and parties. Inasmuch as the

(continued next page)

Thus, while the bona fide office requirement does impose the burden of maintaining an office on some attorneys who would prefer not to maintain one, we believe that those most burdened do not constitute a very large class. This class may include those who practice solely, but sporadically, in New Jersey; those who occasionally practice in New Jersey as part of a larger practice based in another state; and those who prefer to practice without maintaining any office at all. The requirement's burden affects interstate commerce in that it limits the mobility of some lawyers and reduces the options for consumers of the services they provide.

However, under the balancing test, we find that the burden on interstate commerce does not *clearly* outweigh the benefit received from the bona fide office requirement. *See Instructional Sys.*, 35 F.3d at 824. This is not to say that such a requirement is the most narrowly tailored solution to the problem of attorney accessibility. We merely hold that such a requirement is rationally related to the benefit it is supposed to ensure.[4]

Likewise, we believe that the mandatory attendance

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challenged rule can be sustained on that basis, she does not join the portion of this opinion that rejects the New Jersey Supreme Court's argument that the bona fide office requirement helps assure the competence and accountability of attorneys.

[4] We also note that the United States Supreme Court, in dicta, has approved just such a requirement. *Supreme Court of Virginia* v. *Friedman*, 487 U.S. 59, 69-70 (1988) (Virginia "requires that attorneys admitted on motion maintain an office for the practice of law in Virginia . . . . The office requirement furnishes an alternative to the residency requirement. . . .").

requirement for the skills and methods course is rationally related to the benefits it is intended to promote. The skills and methods classes are intended to train attorneys new to the New Jersey bar and to protect the public from untrained attorneys. Mandatory attendance at the course serves a defensible educational purpose: it ensures that attorneys hear — if not listen to — those topics thought to be important by the Appellees.

In support of his argument to the contrary, Tolchin submitted an affidavit from Dean Frank Macchiarola of the Cardozo Law School which, Tolchin argues, indicated that mandatory attendance served no valid educational function. However, the Macchiarola affidavit does not make such sweeping claims. It is limited to disputing some of the reasons proffered by Hogya for the mandatory attendance requirement; to asserting that mandatory attendance has no advantage over other approaches; and to extolling the advantages of customized learning. As a result, this affidavit fails to raise a genuine issue of material fact as to whether the mandatory attendance requirement is rationally connected to its intended benefits.

Moreover, the burdens on interstate commerce imposed by the mandatory attendance requirement for the skills and methods course are relatively small when compared to the benefits it promotes. The first year component of the course requires an attorney to invest a total of 40 hours. For that investment, New Jersey can be confident that attorneys new to its bar are at least

minimally familiar with its laws. This requirement is even a small burden for those attorneys who want to practice in more than one state. Finally, the commuting burden for Tolchin, who is a bridge or two away from New Jersey, is actually less than it is for many New Jersey residents. *See id.*

Because this requirement appears to be a substantial burden only for the relatively few nonresident attorneys who reside a great distance from New Jersey, we do not find that such a burden clearly outweighs the benefits promoted by this requirement. Nor has Tolchin demonstrated that this widely accepted educational policy is in some way so wrong that we must declare it irrational.[5]

Even if the New Jersey rules were to have an element of "economic protectionism," we do not find that the requirements at issue in this case are so protectionist as to fail in the context of a dormant Commerce Clause analysis. Thus, we conclude that the district court

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[5] We note that the Supreme Court, in dicta, has approved of mandatory attendance requirements for continuing legal education. *See Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 69 (1988) (court can "require mandatory attendance at periodic Continuing Legal Education courses."); *Frazier v. Heebe*, 482 U.S. 641, 648, (1987) ("[O]ther more effective means of ensuring the competence of bar members are available . . . including examination or seminar attendance requirements."); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 n.19 (1985) ("A less restrictive alternative would be to require mandatory attendance at periodic seminars on state practice. There already is a rule requiring all new admittees to complete a 'practical skills course' within one year of their admission.").

properly relied upon the *Pike* balancing test, and concur with its result. New Jersey's bona fide office and mandatory attendance requirements generally burden nonresident attorneys to the same degree that they burden resident attorneys. The fact that these requirements may burden commerce in some incidental way is not enough to support Tolchin's claim.

Moreover, states clearly have a substantial interest in assuring the availability of and overseeing attorneys practicing within their borders. *See Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1978) (recognizing "the traditional authority of state courts to control who may be admitted to practice" before them); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (recognizing state courts have "broad power to establish standards for licensing practitioners and regulating the practice of professionals"). And finally, where heightened scrutiny is not warranted, we must not "second-guess the empirical judgment of lawmakers concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987) (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring)).

Tolchin argues that, at the very least, summary judgment should be denied so as to allow further investigation of the burdens of these requirements. We find that further investigation is unnecessary because, as the Fourth Circuit noted in a similar context, to require hearings in such cases

> would deal a serious blow to the capacities of

> the states and localities to further even the most basic regulatory purposes. As the Commerce Clause is implicated by almost every economic regulation . . . and its shadow extends equally far . . . such hearings would be an almost constant process.

Goldfarb v. *Supreme Court of Virginia*, 766 F.2d 859, 862 (4th Cir. 1985). We agree.

B.

Tolchin's Privileges and Immunities Challenge

Tolchin further claims that the bona fide office and mandatory attendance requirements violate the Privileges and Immunities Clause.

The Privileges and Immunities Clause provides that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. This clause was intended to "fuse into one Nation a collection of independent, sovereign States." *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 279 (1985) (quoting *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948)). Under this clause, the terms "citizen" and "resident" are used interchangeably. *Piper*, 470 U.S. at 279 n.6.

The Privileges and Immunities Clause applies only "with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Id.* at 279 (quoting *Baldwin* v. *Montana Fish & Game*

Commission, 436 U.S. 371, 383 (1978)). The United States Supreme Court has found that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Piper*, 470 U.S. at 280 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). The Supreme Court has recognized the practice of law as a privilege under the Privileges and Immunities Clause, "and that a nonresident who passes a state bar examination and otherwise qualifies for practice has an interest protected by the Clause." *Barnard v. Thorstenn*, 489 U.S. 546, 553 (1989); *see also Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 65 (1988); *Piper*, 470 U.S. at 279-83. The practice of law is protected by the Privileges and Immunities Clause because it plays a vital role in the nation's economy and facilitates the vindication of individual and societal rights. *Piper*, 470 U.S. at 280-81.

If a state statute or regulation imposes identical requirements on residents and nonresidents alike and it has no discriminatory effect on nonresidents, it does not violate the Privileges and Immunities Clause. *Lutz v. City of York, Pennsylvania*, 899 F.2d 255, 263 (3d Cir. 1990). But when a challenged restriction deprives nonresidents of a privilege or immunity protected by this clause, it is invalid unless "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284. In addressing these questions, we consider, among other things, whether less restrictive means of regulation

are available. *Barnard*, 498 U.S. at 552-53. Of course, we must distinguish between incidental discrimination against nonresidents and discrimination that imposes too heavy a burden on their privileges. *See id.* at 557.

Over the last ten years, the United States Supreme Court has considered whether a number of bar admission requirements violate the Privileges and Immunities Clause. In 1985, the Court struck down a New Hampshire residency requirement, which limited state bar admission to New Hampshire residents, as a violation of the Privileges and Immunities Clause. *Piper*, 470 U.S. at 288. The Court determined that the residency requirement deprived nonresidents of a protected privilege. *Id.* at 284.

New Hampshire defended its rule, contending that nonresident bar members would be less likely to stay current with local rules and procedures, to behave ethically, to do pro bono work in the state and to be accessible to clients and the court. *Id.* at 285. The Court disagreed with each of these contentions, stating that a nonresident attorney's interest in his or her reputation would provide the same incentive to maintain high standards as would that of a resident attorney. *Id.* at 286. The Court found that New Hampshire had not shown a "substantial reason" for discriminating against nonresident bar applicants and had not demonstrated that the discrimination bore a close relationship to its objectives. *Id.* at 287. The Court concluded that less restrictive alternatives — including mandatory attendance at seminars on state practice — would support the State's

interest in ensuring that admitted attorneys were familiar with local rules and procedure. *Id.* at 284-87.

Similarly, in *Friedman*, the Supreme Court struck down a Virginia rule that permitted admission to the Virginia bar simply on motion for attorneys who had become permanent residents of Virginia and were licensed in another state. *Friedman*, 487 U.S. at 61. Nonresidents of Virginia admitted to practice in another state, however, were required to take the Virginia bar exam. The Supreme Court determined that Virginia's discretionary admissions policy violated the Privileges and Immunities Clause by denying nonresident attorneys the opportunity to practice law in Virginia on terms substantially equal to those of resident attorneys. *Id.* at 70. In so holding, the Court specifically noted that Virginia's requirement that attorneys maintain in-state offices furnished a less restrictive alternative to protect its regulatory interests. *Id.*

More recently, in *Barnard v. Thorstenn*, 489 U.S. 546 (1989), the Supreme Court struck down a residency requirement incorporated into a District Court of the Virgin Islands Rule. This rule provided that before an otherwise qualified attorney could be admitted, that attorney must establish that he or she resides and intends to continue residing in the Virgin Islands. *Id.* at 559. The Supreme Court held that this residency requirement violated the Privileges and Immunities Clause by excluding nonresidents from the Virgin Islands bar. *Id.* Moreover, the Court determined that the residency

requirement did not bear a substantial relation to the District Court of the Virgin Islands' objectives, which included ensuring the availability of nonresident attorneys and maintaining an adequate level of competence in the local laws, which were infrequently published. *Id.* at 558-59.

The Court found that less restrictive means existed to address these concerns. Nonresidents could associate with local counsel, relieving the State of any burden associated with accommodating nonresidents' travel schedules. *Id.* at 555. The Court also found that if the Virgin Islands failed to publish legal materials in a timely manner, the problem of attorneys staying current with local law would be just as severe for residents as nonresidents. *Id.* at 556.

Since 1985, then, the United States Supreme Court has struck down restrictions on state bar admission requirements, and has indicated that a state must treat residents and nonresidents equally when it considers an individual's admission to the bar. As a result of these decisions, all states have eliminated residency-based bar admission requirements.[6] A state's interest in regulating the practice of law is similar to its interest in regulating admission to the bar, and the Supreme Court cases in this area offer us guidance in our analysis.

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[6] *See* Brian N. Corrigan et al., *Admission?, Yes; Practice? No: New York Inconsistent Treatment of Nonresident Attorneys*, 6 St. John's J. Legal Comment. 383, 390 (1991).

Our Privileges and Immunities analysis has two steps. First, do the bona fide office and mandatory attendance requirements discriminate against nonresident attorneys? Second, if they do, is the imposition too heavy a burden on the privileges of nonresidents, and does it fail to bear a substantial relationship to New Jersey's objective? *See Barnard v. Thorstenn*, 489 U.S. 546, 557 (1989).

As noted in Section III. A., above, both requirements similarly affect residents and nonresidents. Resident and nonresident attorneys alike must maintain a New Jersey office. Moreover, as the district court noted, the bona fide office requirement provides New Jersey with a reasonable avenue through which it can protect its interest of ensuring that attorneys licensed in New Jersey are available to New Jersey courts, practitioners and clients. *See Friedman*, 487 U.S. at 69-70 (recognizing that an in-state office requirement was an appropriate and less restrictive means of enforcing Virginia's full time practice restriction).

Similarly, the mandatory attendance requirement applies equally to residents and nonresidents. Tolchin argues that the mandatory attendance policy is discriminatory because it unduly burdens nonresident attorneys who may not be able to find time to attend the skills and methods class. However, as we have already noted, a New Jersey resident may need to travel farther and longer than someone in New York City to get to a course site. In other words, the discrimination here is

based on the inconvenience of course sites and not on residence status. Nonresidents who wish to practice law in New Jersey are required to make the effort to attend continuing education courses. This is a rational requirement, given the need to educate attorneys new to the New Jersey bar and given traditional educational approaches.[7]

We conclude that the bona fide office and mandatory attendance requirement do not impose a disproportionately heavy burden on nonresidents. These requirements bear a substantial relationship to New Jersey's goal of regulating the practice of law to the benefit of the public and are not overly restrictive of attorneys. Thus, these requirements do not violate the Privileges and Immunities Clause. *See Barnard v. Thorstenn*, 489 U.S. at 557.

C.

Tolchin's Equal Protection Clause Challenge

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The threshold question is what standard governs the equal protection analysis in this case.

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[7] Moreover, as we noted above, the United States Supreme Court has indicated in dicta that such a requirement was consistent with the Privileges and Immunities Clause. *Friedman*, 487 U.S. at 69;

(continued next page)

Tolchin argues that the right to practice law in New Jersey is a fundamental right for equal protection purposes. Thus, Tolchin claims, the district court erred in granting summary judgment to the Appellees on his equal protection challenge because it did not apply the strict scrutiny standard of review to the bona fide office and the mandatory attendance requirements. In the alternative he argues that these requirements would not even survive rational basis review.

We have found that as a general matter, "economic and social legislation is subject to rational basis review, under which a law need only be 'rationally related to a legitimate state interest.'" *Schumacher* v. *Nix*, 965 F.2d 1262, 1266 (3d Cir. 1992) (quoting *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam)). However, where legislation establishes a classification that implicates fundamental rights or draws upon suspect distinctions such as race, religion or alienage, the legislation must meet strict scrutiny analysis. *Schumacher*, 965 F.2d at 1266. While we are not reviewing legislation in the traditional sense, judiciary-approved rules fall within the ambit of the Equal Protection Clause. *Id.* at 1266 n.6.

The Supreme Court has indicated that the right to practice law is not a fundamental right for the purposes of the Fourteenth Amendment. *See Leis* v. *Flynt*, 439 U.S. 438, 442 n.5 (1979) ("[T]he suggestion that the

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Piper, 470 U.S. at 285 n.19; *see* n.5 above.

Constitution assures the right of a lawyer to practice in the court of every State is a novel one, not supported by any authority brought to our attention."); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957) ("[A] State can require high standards of qualification . . . before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."). Moreover, we have flatly rejected the argument that the practice of law is a fundamental right protected by the Equal Protection Clause. *Edelstein v. Wilentz*, 812 F.2d 128, 132 (3d Cir. 1987); *In the Matter of Roberts*, 682 F.2d 105, 108 (3d Cir. 1982).

Tolchin claims that *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), supports his position. In *Piper*, the Court determined that the "the opportunity to practice law should be considered a 'fundamental right'" which "falls within the ambit of the Privileges and Immunities Clause." *Id.* at 281. Tolchin attempts to bootstrap this use of the term "fundamental right" into equal protection jurisprudence. However, "fundamental" privileges and immunities are not interchangeable with the rights deemed "fundamental" for equal protection purposes. *See Friedman v. Supreme Court of Virginia*, 822 F.2d 423, 426 (4th Cir. 1987), *aff'd*, 487 U.S. 59 (1988) (recognizing that "the Privileges and Immunities Clause protects more [rights] than those rights which are considered fundamental individual rights protected by the Fourteenth Amendment").

The bona fide office and mandatory attendance requirements apply to all attorneys who want to practice in New Jersey. They do not create a suspect classification based on race, religion or alienage. Accordingly, there is simply no basis upon which Tolchin can credibly argue that strict scrutiny is the appropriate standard of review. *See Schumacher*, 965 F.2d at 1266. We conclude that Tolchin's claim that the bona fide office and mandatory attendance requirements deny him the right to practice law is subject to a rational basis review.

Tolchin argues that even if heightened scrutiny is unwarranted, the bona fide office and the mandatory attendance requirements fail to survive rational basis review. He claims that these requirements are not rationally related to New Jersey's interest in regulating the practice of law. To demonstrate the alleged irrationality of the requirements, Tolchin suggests a number of alternatives, less burdensome to him, that the New Jersey Supreme Court could implement to achieve its objectives. We need not consider these alternatives. For the purposes of rational basis review, we have held that a rule need not be the least restrictive means of achieving a permissible end. *Id.* So long as the New Jersey Supreme Court "could rationally have decided" that its action would further its goal, "the Equal Protection Clause is satisfied." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *see also Parham v. Hughes*, 441 U.S. 347, 351 (1979) ("Under a rational basis test, a law is entitled to a presumption of validity.").

Both the bona fide office and mandatory attendance requirements are rationally related to New Jersey's interest in regulating the practice of law. We have already concluded that the bona fide office requirement is rationally related to New Jersey's interest in ensuring that attorneys admitted to practice law in New Jersey are available to New Jersey courts. *See* Section III. A., above. The fact that Tolchin and others similarly situated may be burdened by this requirement is not enough to deem the requirement invalid under the rational relation test. *See Schumacher*, 965 F.2d at 1266. The skills and methods course was developed to assist attorneys in their transition to practice in New Jersey from law school or practice in another state. The mandatory attendance requirement, by ensuring that attorneys be, at a minimum, present at the Continuing Legal Education classes, will tend to ensure that attorneys absorb the lessons of the course. While Tolchin may be correct in maintaining that he could just as easily learn the material from the comfort of his own home, rational basis review does not allow us to conclude that New Jersey was constitutionally required to accommodate him. *See Clover Leaf Creamery Co.*, 449 U.S. at 466.

In summary, the right to practice law is not a fundamental right for the purposes of the Equal Protection Clause. Thus, Tolchin's claim fails because the bona fide office and mandatory attendance requirements are rationally related to New Jersey's legitimate interests in regulating the practice of law within its borders.

D.

Tolchin's Due Process Challenge

Rule 1:26 provides that the skills and methods "course format shall be set forth in the rules of the Board of Bar Examiners." N.J.Ct.R. 1:26. The Board has not promulgated any rules regarding the skills and methods course. Tolchin argues that the implementation of the skills and methods course violate [sic] the Due Process Clause of the Fourteenth Amendment to the Constitution because the New Jersey Board of Bar Examiners failed to adopt the rules governing the format and curriculum of the course through formal rulemaking procedures, thereby depriving him of his right to earn his livelihood by practicing in New Jersey.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property without due process of law."[8] U.S. Const. amend. XIV. To satisfy the requirements of the Due Process Clause, laws and regulations must provide specific standards which avoid arbitrary and discriminatory enforcement. *Grayned v. Rockford*, 408 U.S. 104, 109 (1972). An agency's failure to follow its rules and regulations, however, is not a per se violation of due process. *See United States v. Caceres*, 440 U.S. 741 (1979). Rather, the Due Process Clause is

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[8] Because of the result that we reach in this case, we need not decide the related question of whether one who has passed a state bar exam, but who is for some reason ineligible to practice, has a property interest protected by the Due Process Clause.

implicated only when an agency violates regulations mandated by the Constitution or by law; or when "an individual has reasonably relied on an agency regulations [sic] promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency." *Id.* at 752-53. Due process may also be violated if the government acts arbitrarily or capriciously. *Grayned,* 408 U.S. at 109.

Rule 1:26 is not mandated by the Constitution or by law. Rather, it is a rule promulgated by the New Jersey Supreme Court for the oversight of the New Jersey bar. Furthermore, Tolchin has not made any showing that he has reasonably relied on Rule 1:26 to his detriment.

Rather, the record indicates that Tolchin was unaware of what was required to practice in New Jersey. The New Jersey Supreme Court has approved specific standards which guide the administration of the skills and methods course. *See* Magistrate Report at 14-16. That court specifically directed ICLE to implement a mandatory attendance policy. This directive was only implemented after public notice of the proposal. The record indicates that the Appellees have in all ways — except for promulgating the Board of Law Examiners Rules — acted with forethought and consistency in regard to the skills and methods course. Thus, Tolchin has suffered no violation of due process. *See Grayned*, 408 U.S. at 109.

Tolchin has not been excluded from the practice of law. To the contrary, he has unilaterally decided that the mandatory attendance requirement is too burdensome for

him. As a result, he is unable to satisfy New Jersey's skills and methods course requirement, rendering him ineligible to practice there. Clearly, then, Tolchin's inability to practice law is due to his own actions and not to any constitutional due process violation.

IV.

In conclusion, Tolchin has not raised an issue of fact sufficient to precluded the entry of summary judgment in favor of the Appellees. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

While it may be true, as Tolchin argues, that the bona fide office requirement may include an element of economic protectionism, such is not fatal to a state statute or regulation. *See Piper*, 470 U.S. 274, 285 n.18 (1985).

Tolchin may also be right in noting the peculiarities present in this case: these rules were promulgated by members of the New Jersey bar to regulate members of the New Jersey bar. To be sure, there are few checks and balances — aside from seeking redress in the federal courts — to ensure that such rules are not designed primarily for the benefit of the New Jersey bar. However, we are satisfied that the requirements at issue in this case withstand Tolchin's challenge. We continue to believe that states should have latitude "in regulating the practicing of law and admission to the bar." *Schumacher v. Nix*, 965 F.2d 1262, 1269 (3d Cir. 1992).

We recognize that one could argue that some of the recent rapid advances in communication and transportation technology may render the bona fide office requirement's intended benefit of attorney accessibility less significant in the future. *See Piper*, 470 U.S. at 287 n.21 ("Conference calls are being used increasingly as an expeditious means of dispatching pretrial matters."); *Frazier*, 482 U.S. at 649 ("[M]odern communication systems, including conference telephone arrangements, make it possible to minimize the problem of unavailability."). Notwithstanding this concern, and for the reasons mentioned above, we will affirm the district court's grant of summary judgment to the defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Order of District Judge William G. Bassler, United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

ROBERT J. TOLCHIN, Plaintiff,	)	Civ. No. 94-4860 (WGB)
v.	)	
THE SUPREME COURT OF THE STATE OF NEW JERSEY, et. al., Defendants.	)	ORDER

This matter having come before the Court on the defendants' motion for summary judgment; and

The Court having referred the matter to the Honorable Dennis M. Cavanaugh, U.S.M.J., for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) & (C), Fed. R. Civ. P. 72, and Local Rule 40A.2; and

Plaintiff Robert J. Tolchin having filed objections to the Report and Recommendation under Fed. R. Civ. P. 72(b) and Local Rule 40D.5; and

The Court having conducted a de novo review; and

The Court having considered the written submissions of the parties; and

The Court having found the objections to be without merit; and

For good cause shown;

It is on this 14th day of December, 1995 ORDERED that the Report and Recommendation of United States Magistrate Judge Dennis M. Cavanaugh, filed on August 29, 1995 , is hereby **ADOPTED** as the findings of fact and conclusions of law of this Court; and

It is FURTHER ORDERED that defendants' motion for summary judgment is GRANTED; and

It is FURTHER ORDERED that the Complaint is DISMISSED.

/S/

WILLIAM G. BASSLER, U.S.D.J.

Report And Recommendation of Magistrate Judge Cavanaugh, Untied States District Court For The District Of New Jersey

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

ROBERT J. TOLCHIN, Plaintiff,	)	Hon. William G. Bassler
v.	)	Civ. No. 94-4860 (WGB)
THE SUPREME COURT OF THE STATE OF NEW JERSEY, et. al., Defendants.	)	REPORT & RECOMMENDATION

DENNIS M. CAVANAUGH, U.S. Magistrate Judge:

This matter comes before the Court upon motions by Defendants for summary judgment, pursuant to Fed.R.Civ.P. 56. These motions were referred to the undersigned for the within Report and Recommendation by the Honorable William G. Bassler, pursuant to 28 U.S.C § 636(b)(1)(B) and (C), Fed.R.Civ.P. 72, and New Jersey Local Rule 40A.2. Oral argument was heard on June

12, 1995. For the reasons discussed below, the Court recommends that Defendants' motions for summary judgment be granted and Plaintiff's complaint be dismissed.

BACKGROUND

Plaintiff, Robert J. Tolchin ("Tolchin"), is a resident of Scarsdale, New York. Tolchin graduated from Cardozo Law School in 1992. He sat for and passed the New Jersey Bar Exam in July, 1992, and was sworn in to the New Jersey Bar in December 1992.

As a newly admitted attorney, Tolchin was required to complete a skills and methods course on New Jersey practice, approved by the New Jersey Supreme Court as a condition to maintaining his New Jersey license. N.J.Ct.R. 1:21-1(a); N.J.Ct.R. 1:26. The skills and methods course is intended to prepare attorneys for the transition from either law school to legal practice in New Jersey, or from legal practice in another state to legal practice in New Jersey. See ICLE Rule 12G Statement, ¶ 11. The skills and methods course is also intended to familiarize and teach attorneys local nuances of practice and procedure in New Jersey. Id. The New Jersey Institute for Continuing Legal Education ("ICLE") administers the skills and methods course on behalf of the New Jersey Supreme Court. Affidavit of Stephen W. Townsend, ¶ 5 ("Townsend Aff."); see also Affidavit of Joseph J. Hogya, ¶ 7 ("Hogya Aff."). ICLE is the only

organization which has ever administered the skills and methods course. Id.

Beginning January 1, 1987, the New Jersey Supreme Court directed ICLE to enforce a mandatory attendance policy for all registrants of the skills and methods course, irrespective of residence. Hogya Aff. ¶¶ 3-4. The mandatory attendance policy was imposed at the direction and approval of the Supreme Court of New Jersey upon the recommendations of the Supreme Court's Advisory Committee on Bar Admissions and proposals of an ad hoc working group. Townsend Aff. ¶¶ 3-4. Among others, the Advisory Committee on Admissions was comprised of the entire membership of the Board of Bar Examiners. See N.J.Ct.R. 1:27A-2. The mandatory attendance policy was implemented after public notice of the proposed amendment. Townsend Aff. ¶ 4.

Presently, ICLE offers the skills and methods course in four cycles throughout the year in three different scheduling formats. Newly admitted attorneys are free to choose the course cycle and format which is most convenient for them. Regardless of which cycle or format a newly admitted attorney chooses, attendance is mandatory.

In the case at bar, Plaintiff corresponded with ICLE and inquired as to whether he could satisfy the New Jersey continuing education requirements through equivalent courses offered in New York or through home study materials. Affidavit of Robert J. Tolchin, Esq., ¶ 10 ("Tolchin Aff."); Hogya Aff., ¶ 6. Plaintiff was advised that

in order to satisfy the New Jersey continuing education requirements he must physically attend the courses in New Jersey. Id.

Plaintiff initiated the present action to challenge the constitutionality of the mandatory attendance requirement. Tolchin alleges that the mandatory attendance requirement violates the Privilege [sic] and Immunities Clause of Article IV § 2, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Commerce Clause and the right to interstate travel. Complaint, ¶¶ 59-64. Additionally, Plaintiff claims that the bona fide office requirement under N.J.Ct.R. 1:21-1(a) violates the Privileges and Immunities Clause of Article IV § 2, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Commerce Clause, the First Amendment and the right to interstate travel. Complaint, ¶¶ 78-84.

Presently before the Court are Defendants[1] [sic] motions for summary judgment. Defendants contend that Plaintiff's complaint fails to state a claim upon which relief can be granted because neither the mandatory attendance requirement nor the bona fide office requirement violate any provisions of the United States Constitution. The

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[1] Motions for summary judgment were filed separately on behalf of Defendants ICLE and Joseph J. Hogya, Esq. (hereinafter "ICLE"), and Defendants Supreme Court of New Jersey, Robert Wilentz, Stephen W. Townsend, New Jersey State Board of Bar Examiners and Samuel J. Uberman (hereinafter "New Jersey"). Except as otherwise indicated, the Defendants will be referred to collectively as "Defendants".

mandatory attendance requirement does not violate the Privileges and Immunities Clause because it applies equally to both in-state and out-of-state residents.

Defendants argue the Due Process Clause is not violated by the mandatory attendance requirement because sufficient standards have been established to avoid arbitrary administration of the skills and methods course. Specifically, Defendants claim the Advisory Committee on Bar Admissions, on which the Board of Bar Examiners sat, made specific recommendations concerning the curriculum for the skills and methods course. These recommendations were ultimately adopted by the Supreme Court of New Jersey and implemented by ICLE.

Defendants also take the position that Plaintiff's Equal Protection claim is meritless because the mandatory attendance requirement is rationally related to New Jersey's legitimate interest of preparing young attorneys for the rigors of legal practice. Moreover, Defendants contend that Plaintiff's claim that the mandatory attendance requirement violates the Commerce Clause is meritless because the requirement does not discriminate against interstate commerce. Similarly, Defendants insist that Plaintiff's right to travel claim is meritless because the mandatory attendance requirement actually encourages and promotes interstate travel.

Defendants also contend that the bona fide office requirement is constitutional in that it does not violate the Privileges and Immunities Clause because the

requirement applies to both resident and non-resident attorneys. Furthermore, Defendants claim that the bona fide office requirement does not violate the Due Process or Equal Protection Clauses because the requirement is rationally related to New Jersey's interest in insuring that non-resident attorneys are available to local courts, practitioners and clients and promotes familiarity with local practice and procedure. Defendants do not address Plaintiff's Commerce Clause, First Amendment or right to travel claims.

Plaintiff opposes some, but not all, of the arguments raised by Defendants' summary judgment motion. Plaintiff counters Defendants' arguments concerning his Privileges and Immunities claim by asserting that the mandatory attendance policy and bona fide office requirement, while not discriminating against out-of-state attorneys per se, places an undue burden on the right of out-of-state residents to practice law in New Jersey. Plaintiff claims that the mandatory attendance policy and the bona fide office requirements are protectionist measures by the New Jersey Bar to prevent New York and Philadelphia lawyers from practicing law in New Jersey. Transcript from oral argument, June 12, 1995, 13:23-14:6 ("Tr."). As such, Plaintiff claims that "New Jersey is the last bastion of protectionism against out-of-state lawyers". Tr. 13:22-13:23. Plaintiff also claims that the mandatory attendance policy is arbitrary and capricious and violates Due Process because no format or curriculum has been promulgated, contrary to N.J. Court Rule 1:26. Plaintiff fails to oppose Defendants' motion for

summary judgment on the remaining constitutional claims.

DISCUSSION

I. Standard for Summary Judgment[2]

Summary judgment may be granted only if all probative materials of record, viewed with all inferences in favor of the non-moving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986); Todaro v. Bowman, 872 F.2d 43, 46 (3d Cir. 1989). An issue is "genuine" if a reasonable jury could possibly hold in the non-movant's favor with regard to that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A fact is "material" if it influences the outcome under the applicable law. Id. at 248.

The moving party bears the initial burden of demonstrating either (1) that there is no genuine issue of fact and that as a matter of law, the moving party must prevail, or (2) that the non-moving party has not shown facts relating to an essential element of the issue for which it bears the burden. Celotex at 331. Once either showing is

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[2] Essentially, Defendants [sic] motions seek judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). However, since the Defendants have relied on submissions outside the pleadings in support of their motions, Defendants' motions will be treated as motions for summary judgment pursuant to Fed.R.Civ.P. 56(c).

made, the burden shifts to the non-moving party, who must demonstrate facts which support each element for which it bears the burden and establish the existence of genuine issues of material fact. Id. at 333, n.3. To satisfy this burden, the non-moving party "may not rest upon the mere allegations or denials" of its pleading. Fed.R.Civ.P. 56(e). Rather, it must produce sufficient evidence to support a jury verdict in its favor, see Anderson at 249, and not just create "some metaphysical doubt as to material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

The burden of persuasion, however, always remains with the moving party. If there is any reasonable doubt as to the necessity of a trial, summary judgment should not be granted. Celotex at 331; see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-61 (1970).

II. Mandatory Attendance at Skills and Methods Course

N.J.Ct.R. 1:21-1(a), in pertinent part, provides:

> Except as provided below, no person shall practice law in [the State of New Jersey] unless that person is an attorney holding a plenary license to practice in this state, has complied with the R. 1:26 skills and methods course in effect on the date of the attorneys admission, is in good standing, and maintains a bona fide office for the practice of law in this state regardless of where the attorney is domiciled.

N.J.Ct.R. 1:26, in pertinent part, provides:

> All newly admitted attorneys shall successfully complete a skills and methods course that has been approved by the Supreme Court. The course format shall be set forth in the rules of the Board of Bar Examiners. . . . Pursuant to R. 1:21-1(a), failure to complete the course successfully shall render an attorney ineligible to practice law.

In a report issued May 31, 1984, the New Jersey Supreme Court's Advisory Committee on Bar Admission[3] made a recommendation to the Supreme Court that attendance at the skills and methods course be mandatory. Townsend Aff. ¶ 3. The Advisory Committee also made certain recommendations concerning the curriculum of the skills and methods course. See 113 N.J.L.J. 678-679. The Supreme Court referred the Committee's recommendations to an ad hoc working group to develop proposals to restructure the skills and methods course accordingly. Townsend Aff. ¶ 4. On January 30, 1986, proposals were published by the Supreme Court for public comment in the New Jersey Law Journal. Id. Following a period of public comment, the Supreme Court adopted, and ICLE implemented, the proposals developed by the ad hoc working group, upon the recommendations of the advisory committee. Id. at ¶ 5. Since their implementation, ICLE has enforced the proposals developed by the ad hoc working group, including the mandatory attendance policy. Hogya Aff. ¶ 4.

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[3] Each member of the Board of Bar Examiners sat on the Advisory Committee.

Currently, the skills and methods course is offered by ICLE four times per year, in three different scheduling formats, in locations throughout the State. While registrants are free to choose the time and format which is most convenient for them, registrants are required to physically attend all lectures.[4] Id. at ¶ 5.

A. Privileges and Immunities Clause

Plaintiff's complaint alleges that the mandatory attendance policy violates the Privileges and Immunities Clause of the United States Constitution. Defendants claim that the mandatory attendance requirement is constitutional due to the fact that it applies equally to resident and non-resident attorneys.

Article IV, § 2, of the Constitution provides "[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States". The Privileges and Immunities Clause was intended to "fuse into one Nation a collection of independent sovereign States". Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279 (1985) (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948). Thus, the Privileges and Immunities Clause applies "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the nation as a

[4] Registrants may request an exemption from an individual lecture. If granted, the registrant is required to make up the lecture in one form or another. A complete waiver as to all lectures has never been allowed.

single entity". Piper, 470 U.S. at 279 (quoting Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383, (1978).

The practice of law has consistently been considered a "privilege" under Art. IV, § 2. Barnard v. Thorstenn, 489 U.S. 546, 553, (1989); Supreme Court of Virginia v. Friedman, 487 U.S. 59, 65, (1988); Piper, 470 U.S. at 279-283. This is so because the legal profession not only plays a vital role in the national economy, but also facilitates the vindication of important federal rights. See Piper, 470 U.S. at 281. Thus, states may not discriminate against non-resident attorneys right to practice law.

In Piper, the Supreme Court struck down a New Hampshire residency requirement which limited state bar admission to New Hampshire residents. Piper, 470 U.S. at 274. The Piper Court determined that the residency requirement deprived non-residents of a protected privilege. Id. at 284. The Piper Court also determined that the discrimination against non-residents was not substantially justified since less restrictive alternatives, including mandatory attendance at seminars on state practice, supported the State's interest in insuring that admitted attorneys were familiar with local rules and procedure. Id. at 284-286.

Similarly, in Friedman, the Supreme Court struck down a rule which allowed attorneys who were licensed in another state, and had become permanent residents of Virginia, admission to the Virginia bar simply on motion.

Friedman, 487 U.S. at 62. Non-residents of Virginia admitted to practice in another state, however, were required to take the Virginia bar exam. The Supreme Court determined that Virginia's discretionary admissions policy violated the Privileges and Immunities Clause by denying non-resident attorneys the opportunity to practice law in Virginia on terms substantially equal to those of resident attorneys. Id. at 70.

More recently, in Barnard, the Supreme Court struck down a residency requirement incorporated into a local District Court Rule which provided that before an otherwise qualified attorney could be admitted to the Virgin Islands Bar he/she must establish he/she "resided in the Virgin Islands for at least one year immediately preceding his[/her] proposed admission" and that "[i]f admitted to practice, he[/she] intends to continue to reside in and to practice law in the Virgin Islands". Barnard, 489 U.S. at 552-559. The Supreme Court held that the residency requirement violated the Privileges and Immunities Clause by excluding non-residents from the Virgin Islands Bar. Id. Moreover, the Court determined that the residency requirement did not bear a substantial relation to the Virgin Islands District Court's objectives of, among other things, insuring the availability of non-resident attorneys and maintaining an adequate level of competence in local law. Id.

In the present case, neither Piper, Freidman nor Barnard is applicable. Here, the mandatory attendance requirement applies equally to in-state and out-of-state

residents because both resident and non-resident attorneys are required to physically attend the skills and methods class. Thus, the Privileges and Immunities Clause is not implicated since in-state and out-of-state attorneys are given the opportunity to practice law in New Jersey on identical terms. See Friedman, 487 U.S. at 67; Schumacher v. Nix, 965 F.2d 1262, 1265, n. 4 (3d Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1252 (1993).

Nevertheless, Plaintiff asserts that the mandatory attendance policy is discriminatory because it is a calculated measure to preserve the legal market for local attorneys. Tr. 13:22-14:6. Plaintiff also claims that the mandatory attendance policy unduly burdens out-of-state attorneys who are expected to work long hours and are not able to travel to New Jersey to physically attend the skills and methods class. See Tolchin brief in opposition to summary judgment, ¶¶. 16-17; Tolchin Aff. ¶ 8.

Plaintiff's arguments fail to establish a violation of the Privileges and Immunities Clause. Plaintiff evidently believes that because it is inconvenient for him to physically attend the skills and methods course in New Jersey, the mandatory attendance policy is unconstitutional. Plaintiff misconstrues the scope of the Privileges and Immunities Clause.

The purpose of the Privileges and Immunities Clause is "to insure to a citizen of State A who ventures into State B the same privileges that which the citizens of State B enjoy". Lutz v. City of York, Pa., 899 F.2d 255, 262 (3d Cir. 1990)(quoting Toomer, 334 U.S. at 395). States

are under no obligation to make affirmative accommodations to out-of-state residents who find a particular requirement personally burdensome. In this case, Plaintiff claims that it is inconvenient to physically attend lectures in New Jersey. Plaintiff also submits the affidavit of an attorney who resides in New York, but practices in Newark, New Jersey, who claims to find it unreasonably dangerous utilizing public transportation to physically attend the skills and methods course in New Jersey. Affidavit of Amy B. Wagner, ¶ 4; Tr. 36:20-36:25. Plaintiff states that his colleague should not have to "put her life on the line . . . in order to become a member of the Bar in New Jersey". Tr. 36:25-37-2.

Despite Plaintiff's concerns, he and other non-resident attorneys face no greater burden or any more or less inconvenience to attend the skills and methods class in New Jersey than do resident attorneys. Arguably, it is just as inconvenient for an attorney residing in Cape May or High Point New Jersey to travel to the closest lecture site as it is for Plaintiff, or his colleague, to travel to and from New York to the nearest or closest available lecture site in New Jersey. It is for that very reason that ICLE offers the skills and methods class four times a year, in three different scheduling formats, in locations throughout the state. In light of the above, the Court finds that the mandatory attendance policy does not violate the Privileges and Immunities Clause of Article IV § 2.

B. Due Process

Plaintiff's complaint also alleges that, contrary to N.J. Court Rule 1:26, Defendants have failed to promulgate a format or curriculum for the skills and methods course and that such failure is arbitrary and capricious and violates Plaintiff's right to due process of law.

In pertinent part, the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property without due process of law". To satisfy the requirements of the Due Process Clause, laws must provide specific standards which avoid arbitrary and discriminatory enforcement. Grayned v. Rockford, 408 U.S. 104, 109 (1972).

Plaintiff claims that the failure of the Board of Bar Examiners to promulgate rules concerning the format of the skills and methods course renders the mandatory attendance requirement arbitrary and capricious. Plaintiff alleges that Defendants' failure to promulgate rules concerning the format of the course has deprived him of the opportunity of satisfying the ICLE requirements in an equivalent course in New York or through home studies.

Defendants counter in support of their motion for summary judgment that specific rules concerning the format of the skills and methods course have been promulgated and therefore summary judgment is appropriate. Defendants point to the recommendation made by the Supreme Court's Advisory Committee on Bar Admissions, comprised of all the members of the Board of Bar Examiners, which recommended, among

other things, mandatory attendance at the skills and methods course. Defendants state that the Committee's recommendations, which were later approved by the Supreme Court, provide specific standards which guides the administration of the skills and methods course.

This Court is satisfied that appropriate guidelines have been established to avoid arbitrary administration of the skills and methods course. As early as June 1984, the Advisory Committee on Bar Admissions, on which all members of the Board of Bar Examiners sat, made numerous recommendations concerning the administration of the skills and methods course. 113 N.J.L.J. at 678-679. In a report published by the New Jersey Law Journal on June 21, 1984, the Committee recommended that the skills and methods course be offered in eight week cycles in the Spring and Fall of each year. Id. at 678. The Committee also recommended that the skills and methods course be composed of eight "core" courses including: Professional Responsibility, Trial Practice and Procedure, Real Property, Family Law, Wills and Estates, Probate and Estate Administration, Small Business Problems and Administrative Law. Id. The Committee further recommended that each of the eight "core" courses should consist of two three-hour mandatory lectures and a mandatory written exercise. Id. In order to successfully complete the skills and methods course, the Committee recommended that the course be completed within two years following admission to the bar. Id.

Thereafter, in January 1986, an ad hoc working group consisting of members of the New Jersey State Bar Association, the Bar Association's Young Lawyers' Division, the ICLE Advisory Board, the ICLE professional staff and individuals from the Advisory Committee on Bar Admissions published proposals to restructure the skills and methods course in the New Jersey Law Journal. 117 N.J.L.J. 115. The ad hoc working group essentially adopted the recommendations of the Advisory Committee on Bar Admissions with certain modifications.

The group proposed that the skills and methods course be separated into "core" and "elective" components. Id. at 131. They suggested that the "core" program consist of five subjects: Professional Responsibility, Real Estate, Will Drafting and Probate Practice, Family Law and either Civil or Criminal Practice. Id. The working group also proposed that mandatory attendance and mandatory completion of practice exercises would be required for successful completion of the skills and methods course. Id. In order to provide greater flexibility to participants, the working group suggested that the "core program" be offered four times per year. Id. The group also proposed that upon completion of the "core" program, participants would be required to take the remaining trial course (Civil or Criminal) and Administrative Law in year two. Id. Finally, the working group suggested that in year three participants would select two courses among: Small Business Problems, Bankruptcy, Collection Practice, Municipal Land Use, Workers' Compensation or other comparative courses

offered in the ICLE curriculum. Id.

Following a period of public comment, the Supreme Court of New Jersey adopted the working group's proposals for restructuring the skills and methods course. Townsend Aff. ¶¶ 4-5. ICLE has administered the skills and methods course in accordance with the proposals ever since[5]. Id. at ¶ 5.

Far from being arbitrary and capricious, the Supreme Court of New Jersey, with the assistance and input of others, has painstakingly developed the curriculum for the skills and methods course. The curriculum adopted by the Supreme Court clearly articulates the format for the skills and methods course. As the report of the Advisory Committee on Bar Admission and the proposals of the ad hoc working group

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[5] Presently, all candidates who apply to take the New Jersey Bar Exam receive a booklet from the Clerk of the Supreme Court titled "ADMISSION TO THE BAR". The booklet includes, among other things, a description of the skills and methods course. The description states "The Skills and Methods Course is designed to familiarize new members of the New Jersey Bar with some important procedures and techniques of the day-to-day practice of law in New Jersey". The description also states:

> The Skills and Methods course is now made up of a five section "Core Program" to be taken during the year following the bar examination, a two section program to be taken during the second year following the bar examination, and a two-section program to be taken during the third year following the bar examination.

Each candidate also receives an ICLE course brochure which describes in detail the curriculum for the skills and methods course. Thus, each candidate for admission to the New Jersey Bar receives notice of the curriculum for the skills and methods course prior to admission to the Bar.

indicate, the curriculum for the skills and methods course was developed to help young lawyers "bridge the gap" between law school and the practice of law. The "core" courses reflect those topics neophyte attorneys are most likely to encounter in their early years of practice. The mandatory attendance requirement, in conjunction with the mandatory practice exercises requirement, promotes New Jersey's legitimate interest in ensuring that newly admitted attorneys are familiar with local practice and procedure.

This Court is more than satisfied that the curriculum adopted by the New Jersey Supreme Court in 1986, and followed by ICLE ever since, avoids any possibility of the skills and methods course being administered in an arbitrary and capricious manner. Moreover, while the curriculum for the skills and methods course may not be specifically set forth in the Rules of the Board of Bar Examiners, it is clear by its participation with the Advisory Committee on Bar Admissions that the Board of Bar Examiners was crucial in adopting the curriculum for the skills and methods course.

C. Equal Protection

Plaintiff alleges that the mandatory attendance requirement, as a prerequisite for successful completion of the skills and methods course, is a violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiff does not oppose Defendants' motion for summary

judgment on this claim. Therefore, Plaintiff's Equal Protection claim may be consider abandoned[6]. [sic] However, the Court will assume that Plaintiff's Equal Protection claim has not been abandoned.

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws". The threshold question for our equal protection analysis is what standard governs our analysis of the mandatory attendance policy. "As a general matter, economic and social legislation is subject to rational basis review, under which a law need only be 'rationally related to a legitimate state interest'." Schumacher, 965 F.2d at 1266 (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam)) However, where legislation establishes a classification that implicates fundamental rights or draws upon suspect distinctions such as race, religion, or alienage, the legislation must meet strict scrutiny analysis.

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[6] While the burden of proof may lie on the moving party on a motion for summary judgment, the opposing party

> may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial.

California Natural, Inc. v. Nestle Holdings, Inc., 631 F. Supp. 465, 470 (D.N.J. 1986); Fed. R. Civ. P. 56(e). The Court shall rule "on the record the parties have actually presented, not one potentially possible". California Natural, 631 F. Supp. at 470 (quoting Madeirense v. Stulman, 147 F.2d 399 (2d Cir. 1945); See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). "If a party fails to respond in the required manner, the court may, if appropriate, enter summary judgment against it." California

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Schumacher, 965 F.2d at 1266.

Plaintiff claims that the mandatory attendance policy denies him the "fundamental" right to practice law. The right to practice law, however, has never been considered a fundamental right. See Scariano, F.3d at 924; Verner, 533 F. Supp. at 1116. As such, "[a] state can require high standards of qualification such as good moral character or proficiency in the law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Schware v. Board of Law Examiners of New Mexico, 353 U.S. 232, 239 (1957). A state may also set strict requirements for continuing legal practice. Verner, 533 F. Supp. at 1117. Therefore, Plaintiff's claim that the mandatory attendance requirement is denying him the right to practice law is subject to rational basis review.

"Under a rational basis test, a law is entitled to a presumption of validity." Parham v. Hughes, 441 U.S. 347, 351 (1979). "A court will not disturb the law as long as it is rationally related to a legitimate government interest". Scariano, 38 F.3d 924 (citing Schumacher, 965 F.2d at 1269.

As stated earlier, the Court does not believe that the mandatory attendance requirement burdens non-resident attorneys any more, or any less, than resident attorneys. This is so because all attorneys admitted to

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Natural, 631 F. Supp. at 470.

practice law in New Jersey are required to physically attend the skills and methods course, regardless of residence. However, even assuming, the mandatory attendance requirement had a disproportionate impact on nonresident attorneys, the Court finds that mandatory attendance policy is rationally related to a legitimate government interest. Indeed, the skills and methods course was developed to assist young attorneys make the transition from law school to the practice of law. The course is geared to emphasize those topics young attorneys are likely to face in their early years of practice. The mandatory attendance requirement simply furthers the benefits and assures compliance with the skills and methods requirement by demanding physical attendance. Thus, while Plaintiff may believe that the mandatory attendance policy places an undue burden on out-of-state attorney's ability to practice law in New Jersey, and less restrictive alternatives are available, the Court finds that the mandatory attendance policy reasonably promotes New Jersey's interests in insuring a minimum competency level for newly admitted attorneys.

D. Commerce Clause

Plaintiff's complaint also alleges that the mandatory attendance policy unduly burdens interstate commerce. While Plaintiff does not oppose Defendants' motion for summary judgment on this claim, the Court will assume that Plaintiff's Commerce Clause claim is not abandoned.

Article I § 8 of the Constitution provides "Congress shall have Power . . . To regulate commerce . . . among the several States." Generally, two tests are applied in constitutional challenges under the Commerce Clause. First, if legislation is facially neutral, and only has an incidental effect on commerce, the legislation will be upheld unless the burden on commerce is "clearly excessive in relation to the putative local benefits". Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Alternatively, if legislation is discriminatory, the legislation will be invalidated unless justified by reasons unrelated to economic protectionism. Brown-Forman Distillers Corp. v. New York Liquor Authority, 476 U.S. 573, 579 (1986); Government Suppliers Consolidating Services, Inc. v. Bayh, 975 F.2d 1267, 1277 (7th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 977 (1993).

In the present case, since the mandatory attendance policy applies equally to resident and non-resident attorneys, the Court will apply the Pike test. See Lutz v. City of York, Pa., 899 F.2d 255, 265 (3d Cir. 1990). Therefore, the mandatory attendance policy will be upheld unless its burden on interstate commerce outweighs its local benefits.

The Court is satisfied that the benefits of the mandatory attendance policy clearly outweigh the burden, if any, on interstate commerce. The skills and methods course serves a legitimate educational purpose. The course prepares young attorneys for the rigors of legal practice in New Jersey. The course also serves the

important function of protecting the public from untrained attorneys. Mandatory attendance simply advances the benefits and assures compliance with the skills and methods course requirement.

Further, the Court finds it difficult to imagine that an out-of-state attorney would forego admission to the New Jersey bar simply because he\she [sic] were required to physically attend the skills and methods course. Thus, the Court questions whether the mandatory attendance policy actually burdens interstate commerce. Accordingly, the Court finds the mandatory attendance policy for the skills and methods course does not violate the Commerce Clause.

E. Right to Interstate Travel

Plaintiff's complaint alleges that the mandatory attendance requirement unduly and illegally restricts his right to travel. While Plaintiff does not oppose Defendants' motion for summary judgment on this claim, the Court will assume that Plaintiff's right to travel claim is not abandoned.

"[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." Schumacher, 965 F.2d at 1266 (quoting United States v. Guest, 383 U.S. 745, 758 (1966)). However, "[t]he practice of law [] is not a fundamental right or activity". Scariano, 852 F. Supp. at 715 (citing Leis, 439 U.S. at 444). Thus, "[t]he Constitution does not

guarantee that Citizens of State A may move to State B and enjoy the same privileges they did as Citizens of State A, only that citizens of State A may move to State B and be treated on similar terms as the citizens of State B." Schumacher, 965 F.2d at 1267. Nor does the right to travel "require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another". Schumacher, 965 F.2d at 1268 (quoting Leis, 439 U.S. at 443).

A state law implicates the right to travel when it actually deters such travel, when impeding travel is the laws primary objective or when the law uses classifications which serve to penalize the exercise of the right to travel. Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 903 (1986). Here, Plaintiff claims that the mandatory attendance policy unduly restricts his right to travel and practice law. However, the Court cannot fathom how a requirement which is applicable to in-state and out-of-state residents alike, burdens Plaintiff's right to travel or practice law. See Lair v. Goldenhersh, 716 F.2d 401, 412 (7th Cir. 1983) ("[r]equiring [Plaintiff] to sit for and pass the bar examination does not amount to a denial of a basic necessity of life . . . nor does it infringe on a fundamental right."). This is especially true in light of the great deference granted to states in regulating the practice of law. See Schware, 353 U.S. at 239. Moreover, since the mandatory attendance policy applies to in-state and out-of-state residents alike, the policies primary objective is not impeding travel. Nor does the mandatory attendance policy use any classifications which penalize

the exercise of the right to travel or practice law.

In light of the above, the Court finds that Plaintiff has failed to demonstrate that requiring mandatory attendance at the skills and methods course is unconstitutional. First, the mandatory attendance requirement does not discriminate against out-of-state attorneys because the requirement applies equally to resident and non-resident attorneys. Moreover, mandatory attendance furthers the benefits and assures compliance with the skills and methods requirement. Accordingly, the Court recommends that Defendants' motions for summary judgment be granted and Plaintiff's claims concerning the mandatory attendance policy be dismissed.

II. Bona Fide Office Requirement[7]

A. Privileges and Immunities Clause

Plaintiff's complaint alleges that the bona fide office requirement, incorporated in N.J. Court Rule 1:21-1(a)[8], violates the Privileges and Immunities clause because the requirement places an undue burden on out-of-state attorneys. The Supreme Court of New Jersey seeks to

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[7] Plaintiff's complaint alleges that the bona fide office requirement violates numerous constitutional provisions. Plaintiff seeks to hold all Defendants liable for these alleged constitutional violations. However, Plaintiff's complaint is devoid of any basis for holding any Defendants, except the New Jersey Supreme Court, liable for these alleged constitutional violations. Indeed, Art. 6, § 2, ¶ 3 reads "The Supreme Court shall make rules governing the administration of all courts in the state and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted". See State v. Bander, [106] N.J. Super. 196, 200 (Monmouth County Ct.), rev'd. on other grounds, 56 N.J. 1986 (1969) ("It is now well settled in our State that the Supreme Court has exclusive jurisdiction over the practice of law.").

Thus, the Supreme Court of New Jersey is vested with the exclusive authority over the practice of law. Plaintiff's complaint and brief in opposition to the present motion for summary judgment fail to allege that any Defendant, other than the Supreme Court of New Jersey, was responsible for the promulgation and enforcement of R. 1:21-1(a). Accordingly, except for the Supreme Court of New Jersey, the Court recommends that Defendants' motion for summary judgment dismissing Plaintiff's claims related to the bona fide office requirement be granted.

[8] Rule 1:21-1(a), in relevant part, provides:

> [A] bona fide office is a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours. A bona fide office is more than a mail drop, a summer home that is unattended during a substantial portion of the year, or an answering service unrelated to a place where business is conducted.

dismiss Plaintiff's Privileges and Immunities claim on the basis that the bona fide office requirement does not violate the Privileges and Immunities Clause because it applies equally to resident and non-resident attorneys. See Schumacher, 965 F.2d at 1265, n.4.

Significantly, Plaintiff relies on Frazier v. Heebe, 482 U.S. 641 (1987)[9] in opposition to the Supreme Court of New Jersey's motion for summary judgment. In Frazier, the Supreme Court struck down a local District Court Rule which required out-of-state attorneys to maintain an in-state office. Id. The Frazier Court found the in-state office requirement unnecessary and irrational because it did not apply to in-state attorneys. Id. at 649. The Frazier Court noted that a resident attorney could maintain his only office out-of-state and still be admitted to practice in the local District Court. Id. The Court found the distinction irrational and unnecessary because a resident attorney with his/her only office out-of-state was no more available to the Louisiana Court, or no more knowledgeable in Louisiana law, than a non-resident attorney with an office out-of-state. Id.

The Frazier case is readily distinguishable from the case at bar. The bona-fide office requirement here is neither unnecessary nor irrational because it applies to in-state and out-of-state residents alike and provides New

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[9] In Frazier, the Court did not reach the constitutional issues raised by Plaintiff because the Court invalidated the residency and in-state office requirement pursuant to its supervisory authority over the District Courts.

Jersey with a reasonable avenue through which the State can protect its interest in insuring that attorneys licensed in New Jersey are available to New Jersey Courts, practitioners and clients and familiar with local practice and procedure. See Friedman, 487 U.S. at 69-70 (following the Frazier decision, the Supreme Court recognized that an in-state office requirement was an appropriate and less restrictive means of enforcing Virginia's full-time practice restriction); see e.g. R. 1:21-1(a).

Plaintiff's case is a perfect illustration of how the bona fide office requirement promotes New Jersey's interests. At oral argument, Plaintiff indicated that he was considering accepting employment at a law firm in either Mexico or the Netherlands. Tr. 9:10-9:18. Plaintiff indicated that he may prefer to represent the interest of his Dutch or Mexican clients in New Jersey. Id. It is easy to envision the difficulty an adversary or the Court may have in communicating and scheduling conferences with Plaintiff if he did not have a bona fide office in New Jersey. While Plaintiff's example may be extreme, it illustrates the potential difficulties New Jersey Courts and New Jersey practitioners could experience absent the bona fide office requirement.

Moreover, the bona fide office requirement does not violate the Privileges and Immunities Clause because the requirement applies equally to resident and non resident attorneys[10]. As such, resident and non-resident attorneys

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[10] At oral argument, Plaintiff attempted to persuade the
(continued next page)

have the opportunity to practice law in New Jersey on exactly the same terms. See Friedman, 487 U.S. at 67; Schumacher v. Nix, 965 F.2d at 1265, n.4.

B. Due Process

Plaintiff's complaint also alleges that the bona fide office requirement deprives him of property without due process of law. The Supreme Court of New Jersey asserts generally in its motion for summary judgment that the bona fide office requirement does not violate Due Process. While Plaintiff does not oppose the Supreme Court's motion for summary judgment on this claim, the Court will assume that Plaintiff's due process claim is not abandoned.

"A person's 'right' or 'privilege' in the practice of law []has never been among those held to be 'fundamental' so only minimal scrutiny under the rational basis test is required to evaluate claims of deprivations of such a 'right' without due process." Verner, 533 F. Supp. at 1116; see also Scariano, 38 F.3d at 924. Under rational

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Court that it is more convenient and more economical for resident attorneys to maintain an office in New Jersey since resident attorneys can use their homes as a bona fide office. Plaintiff obviously misconstrues the bona fide office requirement and the Court therefore finds Plaintiff's argument unpersuasive.

As N.J.Ct.R. 1:21-1(a) indicates, a bona fide office is more than a mere address. It is a functioning office where an attorney or a representative can be reached during regular business hours. Regardless of residence, an attorney must go to some expense in order to comply with the bona fide office requirement. Moreover, in the Court's experience, most attorneys do not practice out of their homes.

basis review, "[a] court will not disturb the law as long as it is rationally related to a legitimate government interest". Scariano, 38 F.3d at 924.

Generally, states have "broad power to establish standards for licensing practitioners and regulating the practice of professions," Goldfarb, 421 U.S. at 792, so long as the regulations "have a rational connection with the applicant's fitness or capacity to practice law". Schware, 353 U.S. at 239. As has been discussed, the New Jersey bona fide office requirement was adopted to insure that attorneys admitted to practice law in the State of New Jersey are available to New Jersey Courts, practitioners and clients and familiar with local practice and procedure. The Court finds that the bona fide office requirement has a rational connection with an attorneys capacity to practice law.

As Plaintiff's case illustrates, it is not difficult to envision the trouble an adversary or the Court would have in communicating and scheduling conferences with an attorney, such as Plaintiff, who resided in Mexico or the Netherlands, and who represented a client in New Jersey. Absent a bona fide office, Plaintiff would be virtually unreachable considering the differences in time zones and the exorbitant costs of communicating with Mexico or the Netherlands. Moreover, the Court questions whether Plaintiff could remain competent in local practice and procedure if he was employed and residing in either Mexico or the Netherlands. Accordingly, the Court finds that the bona fide office requirement is rationally connected

to an attorneys [sic] capacity to practice law.

C. Equal Protection

Plaintiff claims that the bona fide office requirement deprives him of equal protection of the law, in violation of the Fourteenth Amendment of the United States Constitution. The Supreme Court of New Jersey denies this claim. While the Plaintiff failed to oppose the Supreme Court's motion for summary judgment on this claim, the Court will assume that Plaintiff's Equal Protection claim is not abandoned.

As stated earlier, Plaintiff's Equal Protection claims are subject to rational basis review. See supra. pp. 16-19. As such, "[a] court will not disturb the law as long as it is rationally related to a legitimate government interest". Scariano, 38 F.3d at 924 (citing Schumacher 965 F.2d at 1269.).

The bona fide office requirement is certainly rationally related to the state's interest in insuring that attorneys admitted to practice law in New Jersey are available to New Jersey Courts and practitioners and familiar with local practice and procedure. As has been discussed, the bona fide office requirement enables local courts, practitioners and clients to more easily communicate with non-resident attorneys, whose practice may be focused out-of-state. While Plaintiff may find it inconvenient to establish a bona fide office in New Jersey, Plaintiff must also be cognizant of the interests of

his clients, the Court and other practitioners. The interests of clients, the Court and the legal community as a whole must take precedence over the convenience of individual attorneys. Accordingly, the Court finds that the bona fide office requirement is a reasonable regulation of the practice of law.

III. Sovereign Immunity

Plaintiff's complaint also alleges that the bona fide office requirement violates the Commerce Clause, First Amendment and the right to interstate travel. The Supreme Court's motion for summary judgment fails to address these remaining claims. Nevertheless, Plaintiff's remaining claims against the Supreme Court are barred by sovereign immunity.

The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects or any Foreign State.

The Eleventh Amendment also bars actions by private citizens against state agencies sued as instrumentalities of the state regardless of the relief sought[11]. Pennhurst State

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[11] The Court finds that the Supreme Court of New Jersey is an instrumentality of the state for the purpose of the Eleventh

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School and Hospital v. Halderman, 465 U.S. 89, 100 (1984).

"It is well settled that, absent a clear waiver by a state of its sovereign immunity under the Eleventh Amendment or a congressional abrogation of that immunity, a federal court lacks jurisdiction to hear claims brought by an individual against a state". Jordan v. New Jersey Department of Corrections, 881 F. Supp. 947, 951 (D.N.J. 1995) (citing Pennhurst State School, 465 U.S. at 99). "It is also well settled that Congress did not intend to abrogate the sovereign immunity of the states under the Eleventh Amendment when it enacted 42 U.S.C. § 1983." Jordan, 881 F. Supp. at 951 (citing Edelman v. Jordan, 415 U.S. 651, 676-77 (1984)). Thus, if the Supreme Court of New Jersey has not waived its sovereign immunity, this Court lacks jurisdiction to hear Plaintiff's remaining claims.

"[T]he state of New Jersey has not waived its sovereign immunity from suits under 42 U.S.C. § 1983 generally". Neptune v. Burlington County College, 1993 WL 311960, *3 n.3 (E.D.Pa. 1993). Nor has the Supreme Court of New Jersey consented to be sued in this matter. See Id. Accordingly, since the Supreme Court of New Jersey has not waived its sovereign immunity, Plaintiff's remaining claims[12] against the Supreme Court are barred

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Amendment. See Johnson v. New Jersey, 869 F. Supp. 289, 296-297 (D.N.J. 1994) ("judicial branch is an integral part of the State of New Jersey" and therefore entitled to share in state's sovereign immunity).

[12] The Eleventh Amendment bars not only Plaintiff's claims

(continued next page)

by the Eleventh Amendment.

In light of the above, the Court finds that the bona fide office requirement is constitutional. The bona fide office requirement applies equally to resident and non-resident attorneys. Moreover, the bona fide office requirement promotes New Jersey's legitimate interest in insuring the availability and competence of attorneys admitted to practice in the State. Accordingly, the Court recommends that Defendants' motion for summary judgement [sic] be granted and Plaintiff's claims concerning the bona fide office requirement be dismissed.

CONCLUSION

For the reasons discussed above, it is the recommendation of the undersigned that Defendants' motions for summary judgment be granted and Plaintiff's complaint be dismissed.

Pursuant to Local Rule 40D.5, the parties have ten (10) days from the receipt of this Report and Recommendation to file and serve objections thereto.

Dated: [sic]

/s/
Dennis M. Cavanaugh, U.S.M.J.

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for monetary damages, but Plaintiff's claims for equitable relief as well. See Cory v. White, 457 U.S. 85, 90-91 (1982) (recognizing that Eleventh amendment by its very terms applies to equitable claims).

Orig: Clerk
cc: Hon. William G. Bassler
File
Attorneys of record
Pro se Plaintiff

STATUTES INVOLVED

United States Constitution, article I, section 8, clause 3

Congress shall have the power to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

(The Statutes section continues on the next page.)

NEW JERSEY RULES OF COURT

PART I. RULES OF GENERAL APPLICATION
CHAPTER III. PRACTICE OF LAW AND ADMISSION TO PRACTICE
RULE 1:21. PRACTICE OF LAW

N.J. Court Rules, 1969 R. 1:21-1 (1997)

Version currently in effect, reflecting June 28, 1996 amendment which was effective September 1, 1996 (see below for version in effect at time this action was commenced)

1:21-1. Who May Practice; Appearance in Court

(a) Qualifications. Except as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the R. 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and maintains a bona fide office for the practice of law in this State regardless of where the attorney is domiciled. A bona fide office is more than a maildrop, a summer home that is unattended during a substantial portion of the year, an answering service unrelated to a place where business is conducted or a place where an on-site agent of the attorney receives and transmits messages only. For the purpose of this section, a bona fide office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by

telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time. An attorney who practices law in this State and fails to maintain a bona fide office in this State shall be deemed to be in violation of RPC 5.5(a). An attorney who is not domiciled in this State, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.

A person not qualifying to practice pursuant to the first paragraph of this rule shall nonetheless be permitted to appear and prosecute or defend an action in any court of this State if the person (1) is a real party in interest to the action or the guardian of the party; (2) has been admitted to speak pro hac vice pursuant to R. 1:21-2; or (3) is a law student or law graduate practicing within the limits of R. 1:21-3.

No attorney authorized to practice in this State shall permit another person to practice in this State in the attorney's name or as the attorney's partner, employee or associate unless such other person satisfies the requirements of this rule.

(b) Appearance. All attorneys and pro se parties appearing in any action shall be under the control of the court in which they appear and subject to appropriate disciplinary action. An attorney admitted in another jurisdiction shall not be deemed to be making an appearance in this State by reason of taking a deposition pursuant to R. 4:11-4.

(c) Prohibition on Business Entities. Except as otherwise provided by paragraph (d) of this rule and by R. 1:21-1A (professional corporations), R. 6:10 (appearances in landlord-tenant actions), R. 6:11 (appearances in small claims actions), R. 7:4-2(b) (pleas in municipal court), R. 7:4-4(a) (presence of defendant in municipal court) and by R. 7:7-4 (municipal court violations bureau), a business entity other than a sole proprietor shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State.

(d) Legal Services Organizations. Nonprofit organizations incorporated in this or any other state for the purpose of providing legal services to the poor or functioning as a public interest law firm, and other federally tax exempt legal services organizations or trusts, such as those defined by 26 U.S.C.A. 120(b) and 501(c)(20), which provide legal services to a defined and limited class of clients, may practice law in their own names through staff attorneys who are members of the bar of the State of New Jersey, provided that: (1) the legal work serves the intended beneficiaries of the organizational purpose, (2)

the staff attorney responsible for the matter signs all papers prepared by the organization, and (3) the relationship between staff attorney and client meets the attorney's professional responsibilities to the client and is not subject to interference, control, or direction by the organization's board or employees except for a supervising attorney who is a member of the New Jersey bar.

(e) Appearances Before Office of Administrative Law and Administrative Agencies. Subject to such limitations and procedural rules as may be established by the Office of Administrative Law, an appearance by a non-attorney in a contested case before the Office of Administrative Law or an administrative agency may be permitted, on application, in any of the following circumstances:

(1) where required by federal statute or regulation;

(2) to represent a state agency if the Attorney General does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy;

(3) to represent a county welfare agency if County Counsel does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy;

(4) to assist in providing representation to an indigent as part of a Legal Services program if the non-attorney is a paralegal or legal assistant employed by that program;

(5) to represent a state, county or local government employee in Civil Service proceedings, provided (i) the non-attorney making such appearance is an authorized representative of a labor organization and (ii) the labor organization is the duly authorized representative of the employee for collective bargaining purposes;

(6) to represent a close corporation provided the non-attorney is a principal of the corporation;

(7) to assist an individual who is not represented by an attorney provided (i) the presentation appears likely to be enhanced by such assistance, (ii) the individual certifies that he or she lacks the means to retain an attorney and that representation is not available through a Legal Services program and (iii) the conduct of the proceeding by the Office of Administrative Law will not be impaired by such assistance;

(8) to represent parents or children in special education proceedings, provided the non-attorney has knowledge or training with respect to handicapped pupils and their educational needs so as to enable the non-attorney to facilitate the

presentation of the claims or defenses of the parent or child.

(9) to represent union members and employees entitled to union representation in public employment relations proceedings, provided the appearance is by a union representative.

(10) to represent a county or local government appointing authority in Civil Service proceedings, provided the non-attorney representative is an employee of the appointing authority with special expertise or experience in the matter in controversy and the legal representative for the county or municipality does not provide representation in the particular matter.

No representation or assistance may be undertaken pursuant to subsection (e) by any disbarred or suspended attorney nor by any person who receives any fee for such representation.

NEW JERSEY RULES OF COURT

PART I. RULES OF GENERAL APPLICATION
CHAPTER III. PRACTICE OF LAW AND ADMISSION TO PRACTICE
RULE 1:21. PRACTICE OF LAW

N.J. Court Rules, 1969 R. 1:21-1 (1995)

Version in effect at time this action was commenced (see above for version currently in effect)

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for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.

A person not qualifying to practice pursuant to the first paragraph of this rule shall nonetheless be permitted to appear and prosecute or defend an action in any court of this State if the person (1) is a real party in interest to the action or the guardian of the party; (2) has been admitted to speak pro hac vice pursuant to R. 1:21-2; or (3) is a law student or law graduate practicing within the limits of R. 1:21-3.

No attorney authorized to practice in this State shall permit another person to practice in this State in the attorney's name or as the attorney's partner, employee or associate unless such other person satisfies the requirements of this rule.

(B) APPEARANCE. All attorneys and pro se parties appearing in any action shall be under the control of the court in which they appear and subject to appropriate disciplinary action. An attorney admitted in another jurisdiction shall not be deemed to be making an

appearance in this State by reason of taking a deposition pursuant to R. 4:11-4.

(C) PROHIBITION ON BUSINESS ENTITIES. Except as otherwise provided by paragraph (d) of this rule and by R. 1:21-1A (professional corporations), R. 6:10 (appearances in landlord-tenant actions), R. 6:11 (appearances in small claims actions), R. 7:4-2(b) (pleas in municipal court), R. 7:4-4(a) (presence of defendant in municipal court) and by R. 7:7-4 (municipal court violations bureau), a business entity other than a sole proprietor shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State.

(D) LEGAL SERVICES ORGANIZATIONS. Nonprofit organizations incorporated in this or any other state for the purpose of providing legal services to the poor or functioning as a public interest law firm, and other federally tax exempt legal services organizations or trusts, such as those defined by 26 U.S.C.A. 120(b) and 501(c)(20), which provide legal services to a defined and limited class of clients, may practice law in their own names through staff attorneys who are members of the bar of the State of New Jersey, provided that: (1) the legal work serves the intended beneficiaries of the organizational purpose, (2) the staff attorney responsible for the matter signs all papers prepared by the organization, and (3) the relationship between staff attorney and client meets the attorney's professional responsibilities to the client and is not subject to

interference, control, or direction by the organization's board or employees except for a supervising attorney who is a member of the New Jersey bar.

(E) APPEARANCES BEFORE OFFICE OF ADMINISTRATIVE LAW AND ADMINISTRATIVE AGENCIES. Subject to such limitations and procedural rules as may be established by the Office of Administrative Law, an appearance by a non-attorney in a contested case before the Office of Administrative Law or an administrative agency may be permitted, on application, in any of the following circumstances:

(1) where required by federal statute or regulation;

(2) to represent a state agency if the Attorney General does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy;

(3) to represent a county welfare agency if County Counsel does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy;

(4) to assist in providing representation to an indigent as part of a Legal Services program if the non-attorney is a paralegal or legal assistant

employed by that program;

(5) to represent a state, county or local government employee in Civil Service proceedings, provided (i) the non-attorney making such appearance is an authorized representative of a labor organization and (ii) the labor organization is the duly authorized representative of the employee for collective bargaining purposes;

(6) to represent a close corporation provided the non-attorney is a principal of the corporation;

(7) to assist an individual who is not represented by an attorney provided (i) the presentation appears likely to be enhanced by such assistance, (ii) the individual certifies that he or she lacks the means to retain an attorney and that representation is not available through a Legal Services program and (iii) the conduct of the proceeding by the Office of Administrative Law will not be impaired by such assistance;

(8) to represent parents or children in special education proceedings, provided the non-attorney has knowledge or training with respect to handicapped pupils and their educational needs so as to enable the non-attorney to facilitate the presentation of the claims or defenses of the parent or child.

(9) to represent union members and employees

entitled to union representation in proceedings before the Office of Administrative Law, the Department of Personnel, and the Public Employment Relations Commission, provided the appearance is by a union representative.

No representation or assistance may be undertaken pursuant to subsection (e) by any disbarred or suspended attorney nor by any person who receives any fee for such representation.

NEW JERSEY RULES OF COURT

PART I. RULES OF GENERAL APPLICATION
CHAPTER III. PRACTICE OF LAW AND ADMISSION TO PRACTICE

N.J. Court Rules, 1969 R. 1:26 (1995)

RULE 1:26. SKILLS AND METHODS COURSE

All newly admitted attorneys shall successfully complete a skills and methods course that has been approved by the Supreme Court. The course format shall be set forth in the rules of the Board of Bar Examiners.

Pursuant to R. 1:21-1(a), failure to complete the course successfully shall render an attorney ineligible to practice law. The director or other person in charge of an approved course shall to the Supreme Court the names of attorneys who are ineligible to practice because of their failure to comply with the requirements of the course.

A restoration to eligibility shall abide the correction of the deficiency and submission of the matter to the Supreme Court for its approval, which may be subject to such conditions as the Court deems appropriate.